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## Forsaken Heroes: COVID-19 and Frontline Essential Workers

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# **FORSAKEN HEROES: COVID-19 AND FRONTLINE ESSENTIAL WORKERS**

*James J. Brudney\**

*“Who sees with equal eye, as God of all, A hero perish, or a sparrow fall,  
Atoms or systems into ruin hurl’d, And now a bubble burst, and now a  
world.”*

*– An Essay on Man, Epistle 1, Alexander Pope (1734)*

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### INTRODUCTION

Tin Aye emigrated from a refugee camp in Thailand to Colorado in 2007 with her husband and two children. She worked at the JBS meatpacking plant in Greeley. On May 17, 2020, she died of complications from COVID-19 after being hospitalized on a ventilator for seven weeks. At the time, Aye, age 60, was the eighth JBS Greeley employee (and seventh worker) confirmed to have died from COVID-19; 316 plant workers had tested positive by May 17.<sup>1</sup>

Sandra Kunz, a Walmart cashier, died on April 20, 2020, from complications related to the coronavirus. Despite being 72 years old with a lung condition, Kunz continued working — her husband was injured and out of work, and the couple had bills to pay. Public health and worker safety experts recognize the register as the most dangerous place in the store. Cashiers work at arm’s length from customers all day, making social distancing virtually impossible.<sup>2</sup>

When the COVID-19 pandemic engulfed the United States in early 2020, the concept of essential workers rose to prominence. While the category became a focus for media coverage and political debate, its definition and boundaries have been somewhat fluid. According to the Department of Homeland Security Cybersecurity and Infrastructure Security Agency Advisory Memorandum, the category covers 17 broad groups of workers, amounting to almost half of the workforce.<sup>3</sup> And the CISA guidance,

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1. See Jeremy Harlan, *A Refugee and New Grandmother Was the Eighth Employee at a Colorado Meat Packing Plant to Die from Coronavirus*, CNN (May 18, 2020, 5:00 AM), <https://www.cnn.com/2020/05/18/us/jbs-employee-dies/index.html> [<https://perma.cc/2KRJ-X3SV>].

2. See Nathaniel Meyersohn, *This Is the Most Dangerous Place in the Grocery Store*, CNN (May 1, 2020, 7:56 AM), <https://www.cnn.com/2020/04/30/business/grocery-stores-coronavirus-cashiers/index.html> [<https://perma.cc/P44D-WA8E>].

3. CISA is the Cybersecurity and Infrastructure Security Agency within the Department of Homeland Security. See Advisory Memorandum from Christopher C. Krebs, Dir., Cybersecurity & Infrastructure Sec. Agency (CISA) (May 19, 2020) [hereinafter Advisory Memorandum], [https://www.cisa.gov/sites/default/files/publications/Version\\_3.1\\_CISA\\_Guidance\\_on\\_Essential\\_Critical\\_Infrastructure\\_Workers.pdf](https://www.cisa.gov/sites/default/files/publications/Version_3.1_CISA_Guidance_on_Essential_Critical_Infrastructure_Workers.pdf) [<https://perma.cc/2GRE-FTXQ>]; see also *US States with the Most Essential Workers*, UNITED WAY NAT’L CAP. AREA, <https://unitedwaynca.org/stories/us-states-essential-workers/> [<https://perma.cc/MHE3-82Z6>] (last visited Nov. 8, 2020).

intended to be overly broad,<sup>4</sup> has spawned a range of state responses as to what constitutes “essential work.”<sup>5</sup>

These varied definitional approaches bypass an important distinction among essential workers: those who basically work from home versus those who must travel to their jobs and interact with coworkers and the public on a regular basis. The 40% of essential workers who can work from home have not been unduly vulnerable or precarious.<sup>6</sup> If anything, they were among the fortunate who could count on reasonably steady income in a safe workspace at a time when one-quarter of the working population was experiencing unemployment or pay reductions.<sup>7</sup> On the other hand, roughly 60% of essential workers — often referred to as frontline essential (FE) — can only do their jobs in person.

FE workers are the subject of this Article. The health and safety risks that they endure in service to the economy and country have made them heroes, supportively portrayed in the media and celebrated in cities at a designated early evening hour.<sup>8</sup> What these heroes have not received is adequate workplace health and safety rights or protections.

4. See Advisory Memorandum, *supra* note 3, at 5.

5. Some states embraced the federal guidance as definitional but added more categories of workers. See, e.g., Order of Alabama State Health Officer Suspending Certain Public Gatherings Due to Risk of Infection by COVID-19 (Apr. 3, 2020), <https://governor.alabama.gov/assets/2020/04/Final-Statewide-Order-4.3.2020.pdf> [https://perma.cc/42B5-KMST] (adding religious entities). Other states deferred to the federal guidance. See, e.g., Ga. Exec. Order No. 03.14.20.01 (Apr. 2, 2020) (adopting the definition of “critical infrastructure” from CISA). And still other states endorsed the CISA categories but defined them more narrowly with distinct relevance to their own economies. See, e.g., Cal. Exec. Order No. 33-20 (Mar. 19, 2020); *Essential Workforce*, CAL. ST. PUB. HEALTH OFFICER (Apr. 28, 2020), <https://covid19.ca.gov/img/EssentialCriticalInfrastructureWorkers.pdf> [https://perma.cc/9QPS-5ZFN].

6. Bankers are an example of essential workers operating from home; they process emergency-relief loans for small businesses and coach customers by phone as they navigate online or mobile banking. See Laura Alix, *Coronavirus Through the Eyes of Front-Line Bankers*, AM. BANKER (May 13, 2020, 9:30 PM), <https://www.americanbanker.com/news/coronavirus-through-the-eyes-of-front-line-bankers> [https://perma.cc/9WNS-K47X]. One academic report identifies the CISA guidance as covering over half the total workforce, with 40% of that total not needing to work on the front lines on a regular basis. See Francine D. Blau et al., *Essential and Frontline Workers in the COVID-19 Crisis*, ECONOFACT (Apr. 30, 2020), <https://econofact.org/essential-and-frontline-workers-in-the-covid-19-crisis> [https://perma.cc/NDN3-YGUZ].

7. See Andrew Soergel, *Survey: 1 in 4 Americans Has Lost Job or Income to Coronavirus*, U.S. NEWS & WORLD REP. (Apr. 8, 2020), <https://www.usnews.com/news/economy/articles/2020-04-08/1-in-4-americans-has-lost-job-or-income-to-coronavirus-survey> [https://perma.cc/DP2H-QLLB].

8. See Peter Marks, *The Nightly Ovation for Hospital Workers May Be New York’s Greatest Performance*, WASH. POST (Apr. 6, 2020, 6:15 PM), [https://www.washingtonpost.com/entertainment/theater\\_dance/the-nightly-ovation-for-hospi](https://www.washingtonpost.com/entertainment/theater_dance/the-nightly-ovation-for-hospi)

In addition to individuals like Tin Aye and Sandra Kunz, FE workers encompass at least six identified frontline industry groupings: (1) grocery, convenience, and drug store workers; (2) healthcare professionals and support personnel; (3) public transit workers; (4) janitors and building cleaners; (5) trucking, warehouse, and postal workers; and (6) childcare and social service workers.<sup>9</sup> They produce, process, or deliver vital goods and services at their regular workplaces, interacting with patients, customers, clients, and fellow workers.

There are more than 30 million FE workers in the United States, comprising over 20% of the workforce.<sup>10</sup> Although demographic trends vary across industries, FE workers are overall less white, more Black, more female, more foreign born, and more likely to live in low-income families than the U.S. population as a whole.<sup>11</sup> FE workers also bear disproportionate health risks — as evidenced by higher rates of infection, serious illness, and death.<sup>12</sup>

In the face of these risks, there has been a conspicuous lack of federal leadership in protecting FE workers. One federal law enacted during the

tal-workers-may-be-new-yorks-greatest-performance/2020/04/06/e443195c-7795-11ea-a130-df573469f094\_story.html [https://perma.cc/7UPK-DPFC]; Janet I. Tu, *Seattleites Encouraged to Make 'Joyful Noise' Thursday Night in Appreciation of Front Line Workers in Coronavirus Pandemic*, SEATTLE TIMES (Mar. 26, 2020, 10:28 AM), <https://www.seattletimes.com/life/seattleites-encouraged-to-make-joyful-noise-at-8-p-m-tonight-in-celebration-of-front-line-workers-in-the-coronavirus-pandemic/> [https://perma.cc/58RU-5LZC].

9. See HYE JIN RHO ET AL., CTR. FOR ECON. & POL'Y RSCH., A BASIC DEMOGRAPHIC PROFILE OF WORKERS IN FRONTLINE INDUSTRIES 5–6 (2020) [hereinafter CEPR REPORT], <https://cepr.net/wp-content/uploads/2020/04/2020-04-Frontline-Workers.pdf> [https://perma.cc/QLF6-ZG2C]. There are a multitude of figures circulating regarding the number and demographic breakdown of FE workers. The Article relies on data compiled by the Center for Economic and Policy Research, which uses American Community Survey Data from 2014–2018 and defines frontline industries under the six groupings in the text. These groupings are also used by the New York City Comptroller, among others. See OFF. OF THE N.Y.C. COMPTROLLER, NEW YORK CITY'S FRONTLINE WORKERS (2020) [hereinafter NYC FRONTLINE WORKERS], [https://comptroller.nyc.gov/wp-content/uploads/documents/Frontline\\_Workers\\_032020.pdf](https://comptroller.nyc.gov/wp-content/uploads/documents/Frontline_Workers_032020.pdf) [https://perma.cc/G7WA-DN3N]. For more details on the six groupings, see *infra* Part I.

10. See CEPR REPORT, *supra* note 9, at 7 tbl.1. For a more expansive view of FE workers and essential workers overall, see Adie Tomer & Joseph W. Kane, *To Protect Frontline Workers During and After COVID-19, We Must Define Who They Are*, BROOKINGS (June 10, 2020), <https://www.brookings.edu/research/to-protect-frontline-workers-during-and-after-covid-19-we-must-define-who-they-are/> [https://perma.cc/2LZD-JDCT] (identifying 50 million FE workers, 55% of 90 million total essential workers, and over 30% of total U.S. employment).

11. See CEPR REPORT, *supra* note 9, at 3–4, 7 tbl.1. In New York City, more than 50% of frontline workers are foreign born, which is almost three times the national average. See NYC FRONTLINE WORKERS, *supra* note 9, at 2–4; see also CEPR REPORT, *supra* note 9, at 7 tbl.1 (finding 17.3% of frontline workers are foreign born).

12. See *infra* notes 44–52 and accompanying text.

pandemic provides for paid sick leave, but only to a fraction of those working in FE jobs — and the Department of Labor (DOL) has weakened the provisions Congress approved.<sup>13</sup> With respect to protections such as mandatory personal protective equipment (PPE), social distancing requirements, hazard or premium pay, and application of existing or emergency safety standards, DOL has promulgated mild forms of guidance that offer little meaningful protection and has engaged in virtually no enforcement.<sup>14</sup> A handful of state and local governments have taken partial steps to fill in these large gaps.<sup>15</sup> Overall, the law's response has been fragmented and disappointing.

Some additional protections have resulted from collective bargaining or lobbying efforts by unions.<sup>16</sup> Of particular relevance are union efforts to secure congressional protection for the airline industry that covers up to two million employees.<sup>17</sup> These major *industry-wide* payroll and job protective provisions differ dramatically from the law's traditional *employer-specific* responses to job losses and pandemic conditions in general.<sup>18</sup> The exceptional nature of the industry-wide approach illustrates challenges faced by the great majority of FE workers who, like the great majority of workers nationally, lack union representation that can help them secure such protections.

At the same time, the COVID-19 crisis presents an opportunity for some basic rethinking of how the law regulates workplace safety and health. To start, federal law must address safety and health protections more substantially in industry-wide terms. Rather than relegating millions of FE workers to the piecemeal responses described below, this Article contends that safety and health regulation needs to develop on an occupational or sectoral basis to complement existing firm-specific approaches. Further, safety and health protests driven by unusually hazardous conditions such as COVID-19 deserve meaningful protection that the law does not currently provide. To that end, federal law regulating the scope and consequences of lawful strikes must be reformed.

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13. *See infra* Section II.A.

14. *See infra* Sections II.B–C.

15. *See infra* Sections II.A–D.

16. *See infra* Section II.F.

17. *See* Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116–136, tit. IV, §§ 4114–4120, 134 Stat. 281 (2020).

18. For detailed discussion of the industry-wide airline provisions of the CARES Act, as contrasted with the employer-specific unemployment insurance approach characteristic of U.S. responses, see *infra* Section II.F.

Part I of this Article explores the composition of the FE workforce, including its demographics and income levels, union status, and extent of COVID-19 exposure. Part II addresses in detail the state of legal protection for FE workers, assessing inadequacies in the laws as written and implemented. Part III reflects on the two aspects of legislative change just mentioned, explaining how they can help address the safety and health deficits FE workers (and millions of others) have confronted during the pandemic.<sup>19</sup>

The impact of COVID-19 vividly demonstrates that the nature and extent of health risks vary with the working conditions experienced in different industries and occupation groups. For FE workers whose lives and health are most at risk, a comparable sectoral or industry-wide framework must play a key part in legislative and regulatory responses. Possible models for such a sectoral approach exist — in tripartite arrangements on wages that have featured federal and state government participation, and in past and present industry-wide collective bargaining agreements.<sup>20</sup>

COVID-19 also has shown how grave workplace hazards can arise with little or no warning and persist or worsen if unaddressed. Yet our conception of protected forms of worker protest against such hazards has withered over decades of adverse court and agency rulings.<sup>21</sup> Labor law currently provides limited protection for peaceful grievance-related strikes motivated by health and safety concerns, or for health and safety refusals to work in abnormally dangerous conditions. These minimal protections should be extended: by expanding the definition of strikes to cover intermittent or repeated safety-related walkouts and slowdowns, with or without a union presence, and by prohibiting permanent replacements for all such protest actions.<sup>22</sup>

Finally, this Article refers briefly to the unresolved challenges of immigration law reform — for FE workers in various occupational sectors where non-citizens are vital to performance, it is well past time for legislative or regulatory action.

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19. Reflection occurs at a time when a major labor law reform bill has passed the House of Representatives but has little prospect of success in the Senate during the current Congress; the bill's provisions do not address workplace safety and health generally or the pandemic in particular. *See* Protecting the Right to Organize Act of 2019, H.R. 2474, 116th Cong. (2020); Eli Rosenberg, *House Passes Bill to Rewrite Labor Laws and Strengthen Unions*, WASH. POST (Feb. 6, 2020, 9:21 PM), <https://www.washingtonpost.com/business/2020/02/06/house-passes-bill-rewrite-labor-laws-strengthen-unions/> [<https://perma.cc/2K53-TGHX>].

20. *See infra* Section III.A.

21. *See* Walmart Stores, Inc., 368 N.L.R.B. No. 24 (July 25, 2019); Elk Lumber Co., 91 N.L.R.B. 333 (1950); Int'l Union, UAW. Am. v. Wis. Emp. Rels. Bd., 336 U.S. 245 (1949); NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938).

22. *See infra* Section III.B.

## I. THE COVID-19 FRONTLINE ESSENTIAL WORKFORCE

The Cybersecurity and Infrastructure Security Agency (CISA) March 19 Advisory Memorandum listed a vast range of “operations and services that are typically essential to continued critical infrastructure viability.”<sup>23</sup> But the federal government has not drawn a distinction between essential occupations where operations and services can be performed largely or exclusively from home, and frontline essential occupations where workers must provide their labor in person. That distinction has emerged at the state and local government level, and through analyses conducted by researchers. Moreover, the six industry categories relied on here<sup>24</sup> do not address variance among specific occupations. For instance, the grocery, convenience, and drug store category does not distinguish backroom workers, shelf stockers, and cashiers. Nonetheless, the six categories, ranging from 800,000 workers (public transit) to 16 million (healthcare providers and support personnel, of whom college-educated professionals are an overall minority), reveal considerable information about the nature of those who perform frontline work.

### A. Demographics

Racial trends among the six categories are perhaps the most revealing. For each of the six, the proportion of Black workers is higher than that of the national average, and for all FE workers combined, it is more than 40% higher.<sup>25</sup> For trucking, warehouse, and postal workers; healthcare workers; and childcare and social service workers, the proportion who are Black is substantially higher than the national average for all workers — among public transit workers and in meatpacking, it is more than double the national average.<sup>26</sup>

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23. See Advisory Memorandum, *supra* note 3. The Advisory Memorandum has been updated several times since it was released in March 2020.

24. The categories are grocery, convenience, and drug stores; public transit; trucking, warehouse, and postal service; building cleaning services; healthcare; and childcare and social services. See CEPR REPORT, *supra* note 9, at 5–6; NYC FRONTLINE WORKERS, *supra* note 9, at 2. The healthcare and social service worker components are focused on non-government employees providing services. See NYC FRONTLINE WORKERS, *supra* note 9, at 8.

25. See CEPR REPORT, *supra* note 9, at 7 tbl.1 (finding 17.0% of FE workers are Black whereas the national average is 11.9%). In New York City, the proportion of FE workers who are Black is even higher — more than double the national average for the entire workforce. See NYC FRONTLINE WORKERS, *supra* note 9.

26. The national average is 18.2% for trucking, warehouse, and postal service; 17.5% for healthcare; 19.3% for childcare and social services; 26.0% for public transit; and 25.2% for meatpacking. CEPR REPORT, *supra* note 9, at 7 tbl.1; see also Shawn Fremstad, Hye Jin Rho & Hayley Brown, *Meatpacking Workers Are a Diverse Group Who Need Better Protections*, CTR. FOR ECON. & POL'Y RSCH. (Apr. 29, 2020), <https://cepr.net/meatpacking-workers-are-a-diverse-group-who-need-better-protections/#:~:>



The share of Latinx workers in grocery, convenience, and drug stores; in trucking, warehouses, and postal service; and in childcare and social services exceeds the national average. That share is more than double the national average among building cleaning services workers,<sup>27</sup> as is the proportion of foreign-born workers in building cleaning services.<sup>28</sup> Immigrants are significantly overrepresented in other essential occupations: over half of frontline meatpacking workers are immigrants, as are more than one-fourth of home health aides.<sup>29</sup> Additional studies of FE workers use somewhat different datasets and reach similar conclusions: these workers are disproportionately Black, Latinx, and foreign born,<sup>30</sup> for some occupations strikingly so.<sup>31</sup>

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ext=Immigrants%20are%20particularly%20overrepresented%20in,frontline%20meatpacking%20workers%20are%20immigrants [https://perma.cc/M2M4-KL6U].

27. See CEPR REPORT, *supra* note 9. The national average is 16.8%; it is 18.0% for childcare and social services; 18.5% for grocery, convenience, and drug stores; 20.0% for trucking, warehouse, and postal service; and 40.2% for building cleaning services. *Id.* at 7 tbl.1. In New York City, the proportion of FE workers who are Latinx is again, considerably higher than the average for all workers, including 60% of cleaning workers. Overall, 75% of New York City's FE workers are individuals of color, compared with 41.2% of FE workers across the country. NYC FRONTLINE WORKERS, *supra* note 9.

28. See CEPR REPORT, *supra* note 9, at 7 tbl.1 (finding 38.2% of building cleaning services workers are foreign born whereas the national average of all workers is 17.1%).

29. See CEPR REPORT, *supra* note 9 (home health aides); Fremstad et al., *supra* note 26 (meatpacking workers).

30. See MIKE NICHOLSON & DANIELA ALULEMA, CTR. FOR MIGRATION STUD. OF N.Y., IMMIGRANTS COMPRISE 31 PERCENT OF WORKERS IN NEW YORK STATE ESSENTIAL BUSINESSES AND 70 PERCENT OF THE STATE'S UNDOCUMENTED LABOR FORCE WORKS IN ESSENTIAL BUSINESSES (2020), <https://cmsny.org/wp-content/uploads/2020/05/Printable-New-York-Essential-Workers-Report.pdf> [https://perma.cc/CNR3-2LEK]; Julia Gelatt, *Immigrant Workers: Vital to the U.S. COVID-19 Response, Disproportionately Vulnerable*, MIGRATION POL'Y INST. (Apr. 2020), <https://www.migrationpolicy.org/research/immigrant-workers-us-covid-19-response> [https://perma.cc/5EG8-63GW]; Audrey Kearney & Cailey Muñana, *Taking Stock of Essential Workers*, KFF (May 1, 2020), <https://www.kff.org/coronavirus-policy-watch/taking-stock-of-essential-workers/> [https://perma.cc/EMZ9-LNB7]; Celine McNicholas & Margaret Poydock, *Who Are Essential Workers?*, ECON. POL'Y INST.: WORKING ECON. BLOG (May 19, 2020, 11:25 AM), <https://www.epi.org/blog/who-are-essential-workers-a-comprehensive-look-at-their-wages-demographics-and-unionization-rates/> [https://perma.cc/3Z4M-LP8W]; Tomer & Kane, *supra* note 10.

31. See, e.g., NICHOLSON & ALULEMA, *supra* note 30 (immigrants comprise 31% of workers in New York State essential businesses, and 70% of New York's undocumented labor force are essential workers); Gelatt, *supra* note 30 (immigrants are substantially overrepresented as pharmacists, butchers and meat processors, and workers in manufacturing of food, medicines, and soap/cleaning agents); Kearney & Muñana, *supra* note 30 (FE workers are three times more likely to be Black than other essential workers); Tomer & Kane, *supra* note 10 (Black and Hispanic/Latino workers are overrepresented as industrial truck operators, slaughterers and meatpackers, nursing assistants, and correctional officers).

Data regarding the sex of FE workers are also revealing. In four of the six categories, more than half the workers are female, compared to 48% of the workforce as a whole. More than three-quarters in healthcare, and also childcare and social services, are women. Overall, 64% of FE workers are female.<sup>32</sup>

FE workers are more likely than the workforce as a whole to be compensated at below 200% of the federal poverty line, a measure recognized to reflect low-income employment.<sup>33</sup> Workers in three categories — grocery, convenience, and drug stores; building cleaning services; and childcare and social services — are substantially more likely to live in households below twice the poverty line.<sup>34</sup> Relatedly, FE workers report more difficulty meeting necessary expenses such as food, utilities, and credit card bills during the pandemic,<sup>35</sup> prompting proposals for hazard pay for those workers.<sup>36</sup> Lower levels of education often accompany lower income — that is the case here as well. FE workers are likelier to have a high school degree at most when compared with the workforce as a whole, and less likely to have a four-year college or post-graduate degree.<sup>37</sup>

## B. Union Representation

The overwhelming majority of FE workers lack union representation, as is true for private-sector workers in general. Although data on union representation from the Bureau of Labor Statistics (BLS) do not align

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32. See CEPR REPORT, *supra* note 9, at 8 tbl.2. In public transit and trucking, warehouse, and postal service, women comprise less than 30% of the workforce. The breakdowns by sex are comparable to New York City's. See NYC FRONTLINE WORKERS, *supra* note 9. For an analysis of how the COVID-19 crisis has exacerbated existing racial and gender inequalities, in particular for women of color, see Catherine Powell, *Color of Covid and Gender of Covid: Essential Workers, Not Disposable People*, 32 YALE J.L. & FEMINISM (forthcoming 2021).

33. See CEPR REPORT, *supra* note 9, at 4. The 2020 federal poverty income level for a family of four is \$26,200. See *Federal Poverty Level (FPL)*, HEALTHCARE.GOV, <https://www.healthcare.gov/glossary/federal-poverty-level-fpl/> [<https://perma.cc/X9HQ-CXV7>] (last visited Oct. 30, 2020). For recognition that twice this official level is a broadly accepted metric for low-wage employment and living circumstances, see Heather Koball & Yang Jiang, *Basic Facts About Low-Income Children*, NAT'L CTR. FOR CHILD. POVERTY (Jan. 2018), [http://www.nccp.org/wp-content/uploads/2018/01/text\\_1194.pdf](http://www.nccp.org/wp-content/uploads/2018/01/text_1194.pdf) [<https://perma.cc/PPM5-LKNU>].

34. See CEPR REPORT, *supra* note 9, at 7 tbl.1 (finding 20.6% for all workers versus 30% for childcare and social services; 30.1% for grocery, convenience, and drug store; and 42.4% for building cleaning services). In New York City, the proportions for these three groups are comparable or higher: 34%, 35%, and 39%, respectively. NYC FRONTLINE WORKERS, *supra* note 9.

35. See Kearney & Muñana, *supra* note 30, at 3.

36. See *infra* Section II.D.

37. See CEPR REPORT, *supra* note 9, at 7 tbl.1; Blau et al., *supra* note 6, at 5–6; Tomer & Kane, *supra* note 10, at 11.

directly with the FE worker categories discussed here, some categories are comparable. Private-sector union representation, which overall constitutes 7.1% of that workforce, ranges from 4.7% for retail trade workers to 8.3% for healthcare support workers, 9.7% for building and grounds cleaners, and 13.7% for healthcare practitioners.<sup>38</sup> Although these levels of union representation are quite modest, represented workers receive higher compensation — 4.4% to 22% higher, depending on the category.<sup>39</sup>

Apart from advantages in compensation, union workers enjoy more safety and health benefits and protections than their non-union counterparts. In relation to the COVID-19 pandemic, these protections include greater access to paid sick days, likelier coverage under employer-provided health insurance, collectively bargained requirements for safety and health equipment, and the ability to report unsafe working conditions without retaliation.<sup>40</sup> To take one example, the United Food and Commercial Workers (UFCW) represents workers at grocery stores and meat processing plants across the country. The union has negotiated for premium pay, paid sick leave, and PPE for tens of thousands of workers since the pandemic began.<sup>41</sup> These and other safety and health protections are especially important for FE workers, who bear a disproportionate risk of COVID-19 infection.

### C. Risks of Infection

Inevitably, there will be widespread infection, hospitalization, and death in the midst of a pandemic. Healthcare professionals bear the highest exposure risks in the workforce, and the death toll for these workers

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38. *Table 3: Union Affiliation of Employed Wage and Salary Workers by Occupation and Industry*, U.S. BUREAU LAB. STAT. (Jan. 22, 2020), <https://www.bls.gov/news.release/union2.t03.htm> [<https://perma.cc/Y5KM-RLBA>]. By contrast, local government employees have 39% union representation nationally, and public transit workers are among those benefiting substantially from such representation. *See id.*

39. Compensation is 4.4% higher in retail trades, 9.4% for healthcare practitioners, 16% for healthcare support workers, and 22% for building and grounds cleaners. *Table 4: Median Weekly Earnings of Full-time Wage and Salary Workers by Union Affiliation, Occupation, and Industry*, U.S. BUREAU LAB. STAT. (Jan. 22, 2020), <https://www.bls.gov/news.release/union2.t04.htm> [<https://perma.cc/99SG-PA5Y>].

40. *See* McNicholas & Poydock, *supra* note 30, at 5 (discussing these advantages in some detail).

41. *See id.* *See generally* Press Release, United Food & Com. Workers Int'l Union, Unions Representing Health Care Professionals Call on CDC to Reconsider Protections During Coronavirus Outbreak (Mar. 6, 2020), <http://www.ufcw.org/coronavirus/> [<https://perma.cc/46YR-ZDTD>] (calling on the CDC to strengthen protections for first responders fighting the coronavirus outbreak). For a fuller discussion of protections secured through union representation and collective bargaining, see *infra* Section II.F.

continues to rise.<sup>42</sup> Non-healthcare frontline occupations such as bus drivers and other transit workers, childcare and social service workers, cashiers, and food preparation workers are also ranked as higher risk,<sup>43</sup> and these workers are more often exposed without adequate training, PPE, or social distancing requirements. As these occupations are disproportionately non-white, it is unsurprising that the Centers for Disease Control (CDC) reports rates of hospitalization and death significantly higher among the Black and Latinx populations than among whites.<sup>44</sup> The higher rates of morbidity and mortality also reflect the impact of factors besides job-related exposures, including substandard housing conditions and inequities in healthcare insurance and services.<sup>45</sup>

With respect to infection data for specific occupations, underreporting of confirmed cases and deaths is widespread. Among healthcare providers, mild or asymptomatic infections are less likely to be tested and less likely to be reported.<sup>46</sup> Among meatpacking plants, the true infection rate is “anyone’s guess” because many plants and even state and local health officials refuse to provide the number of illnesses.<sup>47</sup> A similar problem exists with the grocery store industry, where employees may not report from fear of retaliation, and employers do not provide data, citing concerns about the

42. See *Lost on the Frontline*, KAISER HEALTH NEWS (Oct. 28, 2020), <https://www.theguardian.com/us-news/ng-interactive/2020/aug/11/lost-on-the-frontline-covid-19-coronavirus-us-healthcare-workers-deaths-database> [<https://perma.cc/HK2A-YZSC>].

43. See Marcus Lu, *The Front Line: Visualizing the Occupations with the Highest COVID-19 Risk*, VISUAL CAPITALIST (Apr. 15, 2020), <https://www.visualcapitalist.com/the-front-line-visualizing-the-occupations-with-the-highest-covid-19-risk/> [<https://perma.cc/93BK-WKZW>]; see also OCCUPATIONAL SAFETY & HEALTH ADMIN., U.S. DEP’T OF LAB., GUIDANCE ON PREPARING WORKPLACES FOR COVID-19, at 18–20 (2020) [hereinafter GUIDANCE ON PREPARING WORKPLACES FOR COVID-19], <https://www.osha.gov/Publications/OSHA3990.pdf> [<https://perma.cc/6U6U-Y75Y>].

44. See *COVIDView: A Weekly Surveillance Summary of U.S. COVID-19 Activity*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/covidview/index.html> [<https://perma.cc/GY8W-XNYW>] (last visited Nov. 2, 2020) (reporting hospitalization rates by race and ethnicity, March 1 to October 31, 2020).

45. See *Health Equity Considerations and Racial and Ethnic Minority Groups*, CTRS. FOR DISEASE CONTROL & PREVENTION (July 24, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/racial-ethnic-minorities.html> [<https://perma.cc/Z5FQ-D2K6>].

46. See Ctrs. for Disease Control & Prevention, *Characteristics of Health Care Personnel with COVID-19 — United States, February 12–April 9, 2020*, 69 MORBIDITY & MORTALITY WKLY. REP. 477, 479 (2020).

47. See Michael Corkery et al., *As Meatpacking Plants Reopen, Data About Worker Illness Remains Elusive*, N.Y. TIMES (May 25, 2020), <https://www.nytimes.com/2020/05/25/business/coronavirus-meatpacking-plants-cases.html> [<https://perma.cc/KE9Y-5KBL>].

health, safety, and privacy of their workers.<sup>48</sup> Notwithstanding these reporting inadequacies, partial data collected on meatpackers, grocery workers, healthcare personnel, and transit workers as of late August 2020 reveal over 200,000 positive tests and more than a thousand deaths.<sup>49</sup>

One striking indicator in the meatpacking industry has been infection rates for rural counties with meatpacking plant outbreaks. The average infection rate in late May in these counties was almost 1,100 per 100,000 — more than five times the average rate of rural counties without meatpacking plants.<sup>50</sup> In late May 2020, six of the ten U.S. counties with the highest infection rates were home to meatpacking plants suffering from outbreaks — rates range from 4,190 to 7,865 per 100,000.<sup>51</sup> As a point of comparison, the infection rate in New York City during that time was 2,512 per 100,000.<sup>52</sup>

48. See Nicole Dungca et al., *On the Front Lines of the Pandemic, Grocery Workers Are in the Dark About Risks*, WASH. POST (May 27, 2020), <https://www.washingtonpost.com/investigations/2020/05/24/grocery-workers-coronavirus-risks/> [https://perma.cc/YY3V-6CMB].

49. For meatpackers, see Sky Chadde, *Tracking Covid-19's Impact on Meatpacking Workers and Industry*, MIDWEST CTR. FOR INVESTIGATIVE REPORTING, <https://investigatamidwest.org/2020/04/16/tracking-covid-19s-impact-on-meatpacking-workers-and-industry/> [https://perma.cc/BD4M-N2M2] (last visited Oct. 30, 2020) (reporting at least 41,000 positive cases and 214 deaths as of October 30, 2020). For grocery store workers, see Abha Bhattarai, *Grocery Workers Say Morale Is at an All-Time Low: 'They Don't Even Treat Us Like Humans Anymore,'* WASH. POST (Aug. 12, 2020), <https://www.washingtonpost.com/business/2020/08/12/grocery-workers-coronavirus/> [https://perma.cc/4M9G-M576] (reporting, as of August 12, 2020, at least 8,200 positive cases and 130 deaths). For healthcare providers, see *Cases & Deaths Among Healthcare Personnel*, CTRS. FOR DISEASE CONTROL & PREVENTION, [https://covid.cdc.gov/covid-data-tracker/?CDC\\_AA\\_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fcases-updates%2Fcases-in-us.html#health-care-personnel](https://covid.cdc.gov/covid-data-tracker/?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fcases-updates%2Fcases-in-us.html#health-care-personnel) (last visited Nov. 2, 2020) (reporting at least 201,992 positive cases and 786 deaths as of November 2, 2020). For transit workers, see Jose Martinez, *NYC Subway Crews Hit Hardest by Coronavirus, MTA Numbers Show*, CITY (June 1, 2020, 5:05 PM), <https://www.thecity.nyc/2020/6/1/21277407/nyc-subway-crews-hit-hardest-by-coronavirus-pandemic-mta-numbers-show> [https://perma.cc/L6MV-KE56] (addressing New York City alone; updated to August 27, 2020, reporting at least 9,500 positive cases and 127 deaths).

50. See Leah Douglas & Tim Marema, *When COVID-19 Hits a Rural Meatpacking Plant, County Infection Rates Soar to Five Times the Average*, FOOD & ENV'T REPORTING NETWORK (May 28, 2020), <https://thefern.org/2020/05/when-covid-19-hits-a-rural-meatpacking-plant-county-infection-rates-soar-to-five-times-the-average/> [https://perma.cc/HE8Y-5PMJ].

51. *Id.*

52. John Elflein, *Rates of Coronavirus (COVID-19) in the United States in the Most Impacted Counties as of June 9, 2020*, STATISTICA (Aug. 24, 2020), <https://www.statista.com/statistics/1109053/coronavirus-covid19-cases-rates-us-americans-most-impacted-counties/> [https://perma.cc/HC2B-W5V8].

## II. INADEQUATE PROTECTIONS FOR FRONTLINE ESSENTIAL WORKERS

Government efforts to protect health and safety during the COVID-19 outbreak have addressed the general population as well as the workforce. Measures aimed at the workforce as a whole fall into preventive, ameliorative, and compensatory categories, and these measures have enhanced protections available to FE workers as well. At the same time, the patchwork changes in federal and state law have been uneven, inconsistent, and seriously inadequate. Taken as a whole, the fragmented responses are unworthy of the “heroes” rhetoric attached to these workers. FE workers, recognizing this irony, have pointed to the inadequate protections accompanying their “heroes” label.<sup>53</sup>

### A. Paid Leave

The Families First Coronavirus Response Act (FFCRA)<sup>54</sup> creates two new kinds of paid leave for employers with fewer than 500 employees, both of which terminate December 31, 2020.<sup>55</sup> The Act mandates paid family and medical leave for employees unable to work because they are caring for their children.<sup>56</sup> It further requires employers to provide up to 80 hours of emergency paid sick leave for a range of reasons related to COVID-19.<sup>57</sup> Both provisions are enforced through existing labor law statutes, including private rights of action.<sup>58</sup>

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53. See, e.g., Karleigh Frisbie Brogan, *Calling Me a Hero Only Makes You Feel Better*, ATLANTIC (Apr. 18, 2020), <https://www.theatlantic.com/ideas/archive/2020/04/i-work-grocery-store-dont-call-me-hero/610147/> [<https://perma.cc/8RT9-SQUT>]; Hanna Wallis, *Nurses Say They Don't Want to Be Called Heroes During the Coronavirus Pandemic*, TEEN VOGUE (Apr. 28, 2020), <https://www.teenvogue.com/story/nurses-dont-want-to-be-called-heroes> [<https://perma.cc/664Q-TAS2>]. See generally Bhattarai, *supra* note 49 (discussing the difficult work conditions of FE workers).

54. Families First Coronavirus Response Act, Pub. L. No. 116-127, § 1, 134 Stat. 178 (2020).

55. See *id.* § 3102.

56. See *id.* FFCRA, Division C, amends Title I of the Family and Medical Leave Act, providing up to 12 weeks leave, the first two unpaid and thereafter paid at no less than two-thirds the employee's regular pay. See *id.*

57. See *id.* § 5102(a)–(b). The paid sick leave is in addition to any benefits that employees already accrue, including FFCRA's paid family and medical leave. See *id.* § 3102. Employers are not required to provide either form of leave to employees who are healthcare providers or emergency responders. See *id.*

58. Enforcement of the family and medical leave requirements is through existing Family and Medical Leave Act (FMLA) provisions, which authorize private suits against employers covered by the FMLA. See *id.* § 5105(a). Enforcement of paid sick leave protections is through the Fair Labor Standards Act (FLSA): an employer who fails to provide this leave is considered to have failed to pay minimum wages. See *id.*

Although these new federal mandates furnish important temporary protections for millions of workers, their coverage restriction to employers with fewer than 500 employees excludes nearly half of the private-sector workforce.<sup>59</sup> The justification for the large-employer exclusion was that most such companies already offer paid sick days and leave, and thus do not need the federal tax subsidies contained in FFCRA. The reality, however, is that these employers very often provide either no paid sick leave or fewer than ten days; they also generally provide extended family leave only for parents with a new child.<sup>60</sup>

In addition, DOL has issued guidance that restricts or undermines the statutory protections in several meaningful ways.<sup>61</sup> Further, while the legislation authorized DOL to issue regulations “for good cause” to exempt small businesses with fewer than 50 employees in limited circumstances, DOL’s temporary rules effectively invite all small businesses to declare

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59. According to the BLS, 47.6% or approximately 59 million individuals worked for private-sector employers that employ more than 500 employees in 2019. *See Table F: Distribution of Private Sector Employment by Firm Size Class: 1993/Q1 Through 2019/Q1, Not Seasonally Adjusted*, BUREAU LAB. STAT. [hereinafter *Table F*], [https://www.bls.gov/web/cewbd/table\\_f.txt](https://www.bls.gov/web/cewbd/table_f.txt) [<https://perma.cc/GR2S-GQ98>] (last visited Aug. 31, 2020).

60. *See* Steven Findlay, *Congress Left Big Gaps in the Paid Sick Days and Paid Leave Provisions of the Coronavirus Emergency Legislation*, HEALTH AFFS. BLOG (Apr. 29, 2020), <https://www.healthaffairs.org/doi/10.1377/hblog20200424.223002/full> [<https://perma.cc/84AD-3EJR>]; *see also* Michelle Long & Mathew Rae, *Gaps in the Emergency Paid Sick Leave Law for Health Care Workers*, KFF (June 17, 2020), <https://www.kff.org/coronavirus-covid-19/issue-brief/gaps-in-emergency-paid-sick-leave-law-for-health-care-workers/> [<https://perma.cc/R44U-GT8E>] (discussing exclusion of healthcare workers identified *supra* note 57, as well as exclusion of large private employers).

61. These limitations include (i) creating a substantially overbroad application of the “healthcare provider” exemption from paid sick and family leave, contrary to the Act’s definition; (ii) reducing access to leave for those days when the employer does not assign them work, furloughs them, or closes a particular worksite; and (iii) defining leave access at full-day increments although the statute refers to “paid sick time,” which allows for intermittent leave. *See* Letter from Sen. Patty Murray & Rep. Rosa DeLauro to Eugene Scalia, Sec’y of Lab., U.S. Dep’t of Lab. (Apr. 1, 2020) (explaining their concerns at length and referencing specific provisions in FFCRA and DOL Guidelines). A federal district court subsequently voided limitations dealing with the scope of the healthcare provider exemption and with reduced access to sick leave when no work is available. *See* Jonathan Stempel, *Judge Rejects Trump Restrictions on Coronavirus Sick Leave for Employees*, REUTERS (Aug. 3, 2020, 11:08 AM), <https://www.reuters.com/article/us-health-coronavirus-new-york-lawsuit/judge-rejects-trump-restrictions-on-coronavirus-sick-leave-for-employees-idUSKCN24Z1Y6> [<https://perma.cc/6885-3GBR>]; *see also* Chris Lu et al., *Why Americans Don’t Know About Their Right to Paid Sick Leave*, NEWSWEEK (May 4, 2020, 9:00 AM), <https://www.newsweek.com/why-americans-dont-know-about-their-right-paid-sick-leave-opinion-1501532> [<https://perma.cc/K3EP-C8QV>] (addressing these problems and also failure to publicize availability of the paid leave even though Congress allocated \$15 million to DOL to do so).

themselves exempted, with no requirement for agency review or even employer documentation of reasons.<sup>62</sup> Given that 34 million employees work for small businesses, the effect of this added exemption is to leave roughly three-quarters of the private-sector workforce uncovered by the paid leave requirements.<sup>63</sup> Excluding employers with fewer than 50 employees particularly impacts certain occupations; nearly two-thirds of agricultural workers, for instance, are hired by these smaller employers.<sup>64</sup>

Some state and local governments have come forward to try and fill in the sizable gaps regarding paid leave. A California Executive Order requires that paid sick and family leave be provided for food sector workers anywhere in the food supply chain, working for companies that employ 500 or more nationwide.<sup>65</sup> New York, New Jersey, Michigan, and Colorado, among other states, have extended paid sick leave and family and medical leave to employees not limited to a particular occupation or industry.<sup>66</sup> Some of these states have targeted protection to workers in small business settings with fewer than 50 employees.<sup>67</sup> In addition, local governments have

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62. See Families First Coronavirus Response Act, Pub. L. No. 116-127, § 5111, 134 Stat. 178 (2020) (authorizing regulations to exempt small businesses “for good cause”); *id.* § 5111(2) (authorizing exemption of employers with fewer than 50 employees “when the imposition of [leave] requirements would jeopardize the viability of the business as a going concern”); 29 C.F.R. § 826.40(b) (2020) (allowing exemption if eligible employees’ absence would cause small business expenses and obligations to exceed business revenue, would pose a substantial risk to financial health or operational capacity, or would prevent business from operating at minimum capacity. Although small businesses must document and retain records justifying denial of leave in connection with unavailability of childcare, no such requirement exists for denial of paid leave for other reasons).

63. According to BLS, 34 million individuals, or approximately 27.4% of the active workforce, worked for employers with fewer than 50 employees in 2019. *Table F, supra* note 59.

64. See U.S. DEP’T OF AGRIC., FARM LABOR 22 (2019), <https://downloads.usda.library.cornell.edu/usda-esmis/files/x920fw89s/c821h164m/fq9788943/fmla1119.pdf> [<https://perma.cc/N7NB-E3RV>]. See generally Daniel Costa & Philip Martin, *Nine in 10 Farmworkers Could Be Covered by the Paid Leave Provisions of the Families First Coronavirus Response Act — but Not If Smaller Employers Are Exempted*, ECON. POLICY INST.: WORKING ECONS. BLOG (Mar. 31, 2020, 2:59 PM), <https://www.epi.org/blog/9-in-10-farmworkers-could-be-covered-by-the-paid-leave-provisions-of-the-families-first-coronavirus-response-act-but-not-if-smaller-employers-are-exempted/> [<https://perma.cc/ATF7-GXWH>].

65. See Cal. Exec. Order No. 51-20 (Apr. 16, 2020).

66. See Colorado Health Emergency Leave with Pay (Colorado Help) Rules, COLO. CODE REGS. § 1103-10 (2020); New Jersey Earned Sick Leave, 2020 N.J. Laws Ch. 17 (codified as amended at N.J. STAT. § C.34:11D-3); New Jersey Expanded Family Leave Law, 2020 N.J. Laws Ch. 23 (codified as amended at N.J. STAT. § C.34:11B-3); New York Paid Sick Leave Law, 2020 N.Y. Sess. Laws Ch. 25, § 8091 (McKinney 2020); Mich. Exec. Order No. 2020-36 (Apr. 3, 2020), [hereinafter Michigan Executive Order].

67. N.Y. Sick Leave Law requires: (i) employers with ten or fewer employees provide unpaid quarantine leave, and (ii) employers with fewer than ten employees and net income greater than \$1 million, or employing between 11 and 99 employees, provide at least five days



promulgated their own paid leave ordinances. In California localities, such ordinances vary by the size of employers covered, and some are silent with regard to specific aspects, including job restoration, intermittent use of leave, employer obligation to post notice, and availability of an enforcement action for damages and attorney's fees.<sup>68</sup> These variations at state and local levels indicate a broad-based interest in innovative solutions. At the same time, the unevenness in coverage and protections also reflects gaps left by the absence of a comprehensive federal approach.

Related to sick leave, workers' families and representatives have begun filing wrongful death lawsuits in state courts. Thus far, a number of these suits have been on behalf of deceased individuals who worked in meat processing and chain store occupations.<sup>69</sup> An additional and important development in a number of states is the action taken to extend workers' compensation coverage to COVID-19 infections by reversing the usual presumption that diseases of ordinary life are not covered. The most common approach is to make COVID-19 infections presumptively work-related for healthcare workers and first responders.<sup>70</sup> Some states have

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of paid quarantine leave, and the remainder unpaid. *See* N.Y. Sick Leave Law § 1.1(a). N.J. Family Leave Law applies to employers with at least 30 employees, N.J. Stat. § 34:11B-3(f)(4), while N.J. Earned Sick Leave Law applies to all employers, regardless of size. *See* N.J. Stat. § 34:11D-2(a). Michigan Executive Order, *supra* note 66, at 7(b), mandates that employers, including ones with fewer than 50 employees, provide paid medical leave.

68. *See* L.A. COUNTY, CAL., ORDINANCE CH. 8.200.010 (2020); OAKLAND, CAL., OAKLAND MUNICIPAL CODE CH. 5.94 (2020); SAN JOSE, CAL., URGENCY ORDINANCE NO. 30390 (2020); L.A., Cal., Public Order — Supplemental Paid Sick Leave Due to COVID-19 (Apr. 7, 2020); S.F., Cal., Public Health Emergency Leave Ordinance Implementation Guidance (Apr. 17, 2020).

69. *See, e.g.*, Complaint at 2, *Zuniga v. Safeway Inc.*, No. RG50063313 (Cal. Super. Ct. June 3, 2020); Complaint ¶ 3.1, *Lay v. Tyson Foods, Inc.*, 2020 WL 2511326 (N.D. Tex. May 15, 2020) (No. 2:20-cv-00125-Z); Complaint at 3, *Benjamin v. JBS S.A.*, No. 200500370 (Phila. Cty. Ct. Com. Pl. May 7, 2020); Complaint § V, *Parra v. Quality Sausage Co.*, No. DC-20-06406 (Dall. Cty. Jud. Dist. Ct. May 1, 2020); Complaint at 2, *Evans v. Walmart Inc.*, No. 2020L003938 (Cook Cty. Cir. Ct. Apr. 6, 2020) (removed to S.D. Ala. on May, 27, 2020); *see also* Harris Meyer, *Coronavirus-Related Deaths in Nursing Homes Prompt Lawsuits and Questions About Who's Responsible*, ABA J. (Oct. 1, 2020, 4:00 AM), <https://www.abajournal.com/magazine/article/coronavirus-related-deaths-in-nursing-homes-see-lawsuits-and-questions-about-whos-responsible> [https://perma.cc/DJ3P-L6PH] (reporting 55 wrongful death lawsuits filed against long-term care facilities as of early September).

70. *See, e.g.*, S.B. 241, 31st Leg., 2d Sess. (Alaska 2020) (May 18, 2020); N.D. Exec. Order No. 2020-12 (Mar. 25, 2020); Press Release, Jay Inslee, Wash. Governor, Inslee Announces Workers' Compensation Coverage to Include Quarantined Health Workers/First Responders (Mar. 5, 2020), <https://www.governor.wa.gov/news-media/inslee-announces-workers-compensation-coverage-include-quarantined-health-workersfirst> [https://perma.cc/3JV2-ECEB].

gone further, extending the presumption of coverage to grocery workers, all essential workers, or even all workers.<sup>71</sup>

The Coronavirus Aid, Relief, and Economic Security (CARES) Act, passed in March 2020, was the second major federal law affecting workers.<sup>72</sup> The law's central feature is an economic stimulus package of unprecedented size and scope that includes substantial federal unemployment compensation benefits on top of the existing state benefits system.<sup>73</sup> The CARES Act includes other provisions related to workers' well-being, such as financial support for healthcare industries and tax credits or deferrals for employers.<sup>74</sup> Additional sections of the Act support workers in the heavily unionized air carrier industry;<sup>75</sup> those sections are examined in Section II.F.

### B. PPE and Social Distancing Requirements

The FFCRA does not address safety and health protections for employers to furnish at individual workplaces. These protections may be provided ad hoc on an individual workplace basis, but employers and industries also are in a position to develop and implement workplace infection control plans specific to each type of workplace and its level of COVID-19 exposure. Hospitals, grocery stores, and meat processing plants carry higher and more diverse risks than accounting offices or law firms, warranting different approaches to their respective working conditions and environments. In principle, employer plans should cover a range of factors such as exposure and risk assessment, the need for PPE and other job condition adjustments,

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71. See H.B. 2455, 101st Leg. (Ill. 2020) (enacted June 5, 2020) (extending to all essential workers); Cal. Exec. Order No. 62-20 (May 6, 2020) (extending to all workers otherwise covered under workers compensation); Ky. Exec. Order No. 2020-277 (Apr. 9, 2020) (extending the presumption to grocery store workers and also postal workers and childcare workers).

72. Congress enacted a third statute in March to stimulate coronavirus vaccine research and development. See Coronavirus Preparedness and Response Supplemental Appropriations Act, Pub. L. No. 116-123, 134 Stat. 146 (2020).

73. See Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, § 2104(b)(1)(A)–(B) (2020) (adding an additional \$600 per week for employees receiving unemployment compensation under state law); *id.* § 2107(b)(2) (providing an additional 13 weeks of unemployment compensation benefits than otherwise provided under state law); *id.* § 2102(a)(3)(A) (broadening provision of unemployment benefits to include self-employed, contract, and gig economy workers who would not have otherwise qualified for the new federal aid as long as they self-certify that they are unemployed or unable to work because of listed pandemic-related reasons).

74. See § 3211 (providing supplemental appropriations for health centers to aid prevention, detection, and treatment of COVID-19); *id.* § 2302 (allowing employers to defer the deposit and payment of their portion of Social Security taxes). This Article does not discuss these provisions inasmuch as they do not directly address health and safety protections.

75. See *id.* §§ 4111–4116.

medical removal and wage protection for infected or exposed workers, recording and reporting of infections, training and education of workers, and anti-retaliation protection for workers who raise safety and health concerns.

Relatedly, CDC has issued periodic detailed guidance for employers responding to COVID-19, including addressing actions tailored to particular industries.<sup>76</sup> Overall, CDC has addressed a broad range of protective steps, including undertaking a hazard assessment of the workplace, conducting daily health checks of workers, encouraging employees to wear cloth face coverings in the workplace, implementing policies and practices for social distancing in the workplace, and improving the workplace ventilation system.<sup>77</sup> The logical agency to turn to for implementation of such guidance as enforceable requirements is the Occupational Safety and Health Administration (OSHA) within DOL. As discussed in the following Section, however, OSHA has refused to issue any directive in the form of a provisional or emergency safety and health standard. Instead, the agency has offered its own “Guidance on Preparing Workplaces for COVID-19,” while stating at the outset that this guidance “creates no new legal obligations,” offers “recommendations [that] are advisory in nature,” and describes a voluntary set of actions that employers “[c]an take to reduce workers’ risk of exposure.”<sup>78</sup>

Facing a lack of federal requirements, a few states again stepped up, often beginning when the economy began re-opening after stay-at-home orders. In California, the Department of Industrial Relations specifies that employers must determine if COVID-19 is a hazard in their workplace as

76. See, e.g., *Meat and Poultry Processing Workers and Employers*, CTRS. FOR DISEASE CONTROL & PREVENTION (July 9, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/meat-poultry-processing-workers-employers.html> [<https://perma.cc/UNY7-8CKW>]; *What Grocery and Food Retail Workers Need to Know About COVID-19*, CTRS. FOR DISEASE CONTROL & PREVENTION (Apr. 13, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/grocery-food-retail-workers.html> [<https://perma.cc/F847-9Y34>]; *What Mail and Parcel Delivery Drivers Need to Know About COVID-19*, CTRS. FOR DISEASE CONTROL & PREVENTION (Apr. 17, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/mail-parcel-drivers.html> [<https://perma.cc/Z4H9-JUWU>]; *What Nail Salon Employees Need to Know About COVID-19*, CTRS. FOR DISEASE CONTROL & PREVENTION (June 23, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/nail-salon-employees.html> [<https://perma.cc/PMY8-F9M2>].

77. *COVID-19 Critical Infrastructure Sector Response Planning*, CTRS. FOR DISEASE CONTROL & PREVENTION (May 6, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/critical-infrastructure-sectors.html> [<https://perma.cc/H8AV-ACZE>] (recommending that employers adopt a multi-pronged response plan with goals to maintain healthy business operation, reduce transmission, and maintain healthy work environment).

78. GUIDANCE ON PREPARING WORKPLACES FOR COVID-19, *supra* note 43, at 1, 7.

part of the state's mandated Injury and Illness Prevention Program. If it is a workplace hazard, employers are required to implement infection control measures, including applicable recommendations from the CDC.<sup>79</sup> Other states — including Massachusetts, New York, and New Jersey at early stages and some 35 states by mid-August — mandated the use of masks at all times by the public as well as workers inside grocery stores, pharmacies, and other retail establishments.<sup>80</sup> Several states, including New York, require employers to provide PPE to workers at the employers' expense.<sup>81</sup>

Without systemic occupationally tailored requirements for PPE, social distancing, and other workplace safety protections, FE workers have, at times, acted on their own to try and compel such protections. Workers in hospitals, meat processing plants, warehouse distribution centers, and fast food establishments have brought lawsuits seeking injunctions ordering a range of protective steps.<sup>82</sup> Some court actions have resulted in a measure

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79. *Cal/OSHA Interim General Guidelines on Protecting Workers from COVID-19*, ST. CAL. DEP'T INDUS. RELS. (May 14, 2020), <https://www.dir.ca.gov/dosh/coronavirus/general-industry.html> [<https://perma.cc/AQW5-M6V3>].

80. *See* Mass. Exec. COVID-19 Order No. 31 (May 1, 2020) (requiring that all employers and customers wear masks inside grocery stores, pharmacies, retail stores, and when using mass public transit); N.J. Exec. Order No. 122 (Apr. 8, 2020) (requiring that workers and customers of essential businesses wear face masks); N.Y. Exec. Order No. 202.16 (Apr. 12, 2020) (mandating that all employees in contact with the public wear masks); N.Y. Exec. Order No. 202.34 (May 28, 2020) (allowing any business operator or owner to require any individual to wear a mask). *See generally* Allen Kim et al., *These Are the States Requiring People to Wear Masks When Out in Public*, CNN (Aug. 17, 2020, 5:20 PM), <https://www.cnn.com/2020/06/19/us/states-face-mask-coronavirus-trnd/index.html> [<https://perma.cc/KE7L-FRRM>].

81. *See, e.g.*, Ga. Exec. Order No. 04.02.20.01 (Apr. 2, 2020) (requiring that critical infrastructure employers provide personal protective equipment to workers as available); N.J. Exec. Order No. 122 (Apr. 8, 2020) (ordering that businesses provide, at their expense, face coverings and gloves for employees when in contact with customers or goods); N.Y. Exec. Order No. 202.16 (Apr. 12, 2020) (mandating that employees at all essential businesses be provided with and wear face coverings when in direct contact with the public); R.I. Exec. Order No. 20-24 (Apr. 14, 2020) (mandating that all businesses provide, at their expense, face coverings).

82. For hospitals, see *N.Y. Nurses Ass'n v. Montefiore Med. Ctr.*, 2020 WL 2097627, at \*1 (S.D.N.Y. 2020); Complaint at 19, *Lange v. 24-Hour Med. Staffing Servs. LLC*, No. 30-2020-01140958-CU-OE-CXC (Cal. Super. Ct. May 26, 2020). For meat processing plants, see *Rural Cmty. Workers All. v. Smithfield Foods, Inc.*, No. 5:30-CV-06063-DGK, 2020 WL 2145350, at \*2 (W.D. Mo. May 5, 2020); Complaint ¶ A, *Ornelas v. Cent. Valley Meat Co.*, No. 1:20-cv-01017-AWI-SKO (E.D. Cal. July 22, 2020), 2020 WL 4249733, at \*33. For warehousing operations, see Memorandum of Law of Defendant at 1, *Palmer v. Amazon.com*, No. 1:20-cv-02468-BMC (E.D.N.Y. July 7, 2020), 2020 WL 5236964, at \*1. For fast food restaurants, see generally Complaint, *Massey v. McDonald's Corp.*, No. 2020-ch-04247 (Ill. Cir. Ct. May 19, 2020), 2020 WL 2747338, at \*16–17; Complaint, *Hernandez v. VES McDonald's*, No. RG20064825 (Cal. Super. Ct. June 16, 2020), 2020 WL 32878054, at \*17.

of success, while others have fallen short.<sup>83</sup> The quest for judicially-imposed remedies is likely to expand in the months ahead. In addition, workers in both union<sup>84</sup> and non-union<sup>85</sup> settings have engaged in forms of self-help, staging walkouts to protest the lack of adequate protections. Unionized workers also have negotiated to secure PPE, adequate social distancing, and

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83. In *Massey*, the court granted partial injunctive relief, finding that the restaurants' training on social distancing and ensuring use of masks was deficient. See Angela Childers, *McDonald's Ordered to Train Workers on Social Distancing*, BUS. INS. (June 25, 2020), <https://www.businessinsurance.com/article/20200625/NEWS08/912335302> [<https://perma.cc/JCQ5-P8T8>]. In *Hernandez*, the court granted a preliminary injunction that requires defendant to implement and provide adequate training, safe distancing, paid breaks every 30 minutes for handwashing, and face masks and gloves. See Robert Iafolla, *McDonald's Workers Win Virus Safeguards in 'Dog Diaper' Case (Corrected)*, BLOOMBERG L. (July 10, 2020, 4:28 PM), <https://news.bloomberglaw.com/daily-labor-report/mcdonalds-workers-win-virus-safety-order-in-dog-diaper-case> [<https://perma.cc/R4QJ-W5CD>]; see also *Court Orders Restaurant Company to Allow Worker to Wear Face Covering*, CISION (May 7, 2020, 7:09 PM), <https://www.prnewswire.com/news-releases/court-orders-restaurant-company-to-allow-worker-to-wear-face-covering-301055430.html> [<https://perma.cc/94BF-G3ZB>]. In *N.Y. Nurses Ass'n*, 2020 WL 2097627, at \*3, the court dismissed the lawsuit on grounds the dispute was subject to arbitration under the collective bargaining agreement. In *Rural Cmty. Workers All.*, 2020 WL 2145350, at \*12, the court dismissed the motion for preliminary injunction, ruling that plaintiffs had not demonstrated irreparable harm and dismissed the lawsuit on grounds the agencies had primary jurisdiction.

84. See, e.g., Chris Brooks, *Auto Companies Announce Closure Following Outbreak of Wildcat Strikes*, LAB. NOTES (Mar. 18, 2020), <https://www.labornotes.org/blogs/2020/03/auto-companies-announce-closure-following-outbreak-wildcat-strikes> [<https://perma.cc/2VKF-UY7Q>]; Royce Jones, *'I'm Not Afraid of No Virus Because I Know My God Got Me': Port Authority Bus Drivers Protest for Better Conditions During Coronavirus Pandemic*, CBS PITTSBURGH (Mar. 27, 2020, 5:52 PM), <https://pittsburgh.cbslocal.com/2020/03/27/port-authority-bus-drivers-protest-for-better-conditions/> [<https://perma.cc/EU2Y-K8BR>]; Michael Paulson, *Union Insists Actors Shouldn't Work Till Epidemic Is 'Under Control'*, N.Y. TIMES (May 28, 2020), <https://www.nytimes.com/2020/05/26/theater/actors-equity-theater-reopening-virus.html?smid=em-share> [<https://perma.cc/3UPH-8ZPB>]; Jane Slaughter, *Detroit Bus Drivers Win Protections Against Virus Through Strike*, LAB. NOTES (Mar. 18, 2020), <https://www.labornotes.org/blogs/2020/03/detroit-bus-drivers-win-protections-against-virus-through-strike> [<https://perma.cc/2QFT-X625>]; Lori Valigra, *Bath Iron Works Union Asks for Shipyard Closure After Half of Workers Fail to Show*, WGME (Mar. 24, 2020), <https://wgme.com/news/coronavirus/bath-iron-works-union-asks-for-shipyard-closure-after-half-of-workers-fail-to-show> [<https://perma.cc/U4DZ-TZNF>].

85. See, e.g., Josh Dzieza, *Amazon Warehouse Workers Walk Out in Rising Tide of COVID-19 Protests*, VERGE (Mar. 30, 2020, 2:46 PM), <https://www.theverge.com/2020/3/30/21199942/amazon-warehouse-coronavirus-covid-new-york-protest-walkout> [<https://perma.cc/8DGE-LAGG>]; Sarah Hammond, *'This Is Not a Playing Matter': Perdue Plant Employees Walk Out over COVID-19 Concerns*, WMAZ (Mar. 24, 2020, 9:22 AM), <https://www.13wmaaz.com/article/news/local/perdue-employees-walk-out-as-coronavirus-concerns-grow/93-7c7bdccb-f3ec-439b-b541-9070e758b5cb> [<https://perma.cc/M6J6-A8GH>].

other forms of protection, including additional paid sick leave beyond what is available under federal statute.<sup>86</sup>

This patchwork approach to providing workplace protections has yielded some advances, although worker protests also have been met with retaliatory discipline.<sup>87</sup> Moreover, the absence of an overarching federal presence has meant that FE workers must fend for themselves, usually on an employer-specific basis, to reduce their extraordinary safety and health risks.

### C. Emergency Standards and Agency Enforcement

The federal agency charged with enforcing workplace health and safety has failed to rise to the occasion. Under its 1970 originating statute, OSHA has authority to issue emergency temporary standards (ETS) to protect employees against “grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards.”<sup>88</sup> An ETS serves as a proposed permanent standard, subject to an ensuing notice and comment procedure and operative for no more than six months.<sup>89</sup> Between 1971 and 1983, OSHA issued nine ETSs, some of which were met with resistance from the courts of appeals.<sup>90</sup>

Between 2009 and 2017, OSHA developed an extensive approach to infectious disease rulemaking.<sup>91</sup> Today, the agency could draw on the experience of the California Division of Occupational Safety and Health, applying its pre-existing enforceable standard protecting nurses and other healthcare workers from emerging infectious diseases.<sup>92</sup> The House pressed

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86. See *infra* Section II.F (discussing protections negotiated by United Food & Commercial Workers (UFCW), American Postal Workers Union (APWU), Communications Workers of America (CWA), and transit worker unions).

87. See, e.g., Jay Greene, *Amazon Fires Two Tech Workers Who Criticized the Company's Warehouse Workplace Conditions*, WASH. POST (Apr. 14, 2020, 6:59 PM), <https://www.washingtonpost.com/technology/2020/04/13/amazon-workers-fired/> [<https://perma.cc/A5LX-RPDU>]; Justin Wise, *Nurses Union Says Workers Were Suspended for Refusing to Help Coronavirus Patients Without N95 Masks*, HILL (Apr. 16, 2020, 9:02 AM), <https://thehill.com/policy/healthcare/493095-nurses-union-says-workers-were-suspended-for-refusing-to-help-coronavirus> [<https://perma.cc/SLM6-UJXF>].

88. 29 U.S.C. § 655(c)(1).

89. See *id.* § 655(c)(3).

90. See SCOTT SZYMENDERA, CONG. RSCH. SERV., R46288, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (OSHA): EMERGENCY TEMPORARY STANDARDS (ETS) AND COVID-19, at 22 tbl.A-1 (2020) (listing ETSs).

91. See Letter from Richard Trumka, President, Am. Fed'n of Lab. & Cong. of Indus. Orgs., to Eugene Scalia, Sec'y of Lab., U.S. Dep't of Lab. 8 (Mar. 6, 2020).

92. See Letter from Bonnie Castillo, Exec. Dir., Nat'l Nurses United, to Eugene Scalia, Sec'y of Lab., U.S. Dep't of Lab. & Loren Sweatt, Principal Deputy Assistant, Occupational Safety & Health Admin., U.S. Dep't of Lab. (Mar. 4, 2020).

OSHA to act through a bill requiring ETS promulgation,<sup>93</sup> and the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) sought to compel ETS issuance through a judicial action for extraordinary mandamus relief.<sup>94</sup> The Republican-controlled Senate stalled the legislative effort, and a panel of the D.C. Circuit rejected the lawsuit.<sup>95</sup>

In refusing to issue an ETS, OSHA has relied on CDC guidelines without making them mandatory, thereby removing the prospect of systemic enforcement for employer noncompliance. With respect to enforcement, OSHA stated it would rely on its General Duty Clause to assure adequate protections in individual instances.<sup>96</sup> Yet the agency's enforcement record is stunningly inadequate. Having received more than 6,000 COVID-19-related complaints as of July 7, it had issued exactly one citation: to a Georgia Nursing Home for failing to report employee hospitalizations within 24 hours.<sup>97</sup> In late September, OSHA even withdrew that citation and

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93. The Health & Economic Recovery Omnibus Emergency Solutions Act (HEROES Act), H.R. 6800, 116th Cong. (as approved by House, May 15, 2020).

94. *In re* AFL-CIO, No. 19-1158, 1 (D.C. Cir. 2020).

95. The Senate has not voted on the HEROES Act, which would require OSHA to adopt an emergency standard, "as Majority Leader Mitch McConnell holds out for special legal protections for businesses that could otherwise be sued for failing to provide safe workplaces." The Editorial Board, *Why Is OSHA AWOL?*, N.Y. TIMES (June 21, 2020), <https://www.nytimes.com/2020/06/21/opinion/coronavirus-osha-work-safety.html> [<https://perma.cc/4K7C-V8QH>]. The D.C. Court of Appeals in *In re AFL-CIO* dismissed the motion for a writ of mandamus in a one-paragraph order, finding the agency "reasonably determined that an ETS is not necessary at this time." *In re* AFL-CIO, No. 20-1158, at 1.

96. *See* 29 U.S.C. § 654 (1970) (requiring employers to furnish a place of employment that is "free from recognized hazards that are causing or likely to cause death or serious physical harm to . . . employees"). DOL Secretary, Eugene Scalia, defended OSHA's response to the pandemic and invoked the general duty clause to cite employers, stating that, the general duty clause is "applicable, and we'll use it as appropriate." Bruce Rolfsen, *OSHA Virus Emergency Regulation Not Needed, Labor Chief Says*, BLOOMBERG L. (Apr. 23, 2020, 5:19 PM), <https://news.bloomberglaw.com/safety/osha-virus-emergency-regulation-not-needed-labor-chief-says> [<https://perma.cc/7NTE-3AJ8>].

97. *See* Jane Mayer, *How Trump Is Helping Tycoons Exploit the Pandemic*, NEW YORKER (July 13, 2020), <https://www.newyorker.com/magazine/2020/07/20/how-trump-is-helping-tycoons-exploit-the-pandemic> [<https://perma.cc/15FY-Q2UH>]; Bruce Rolfsen, *First Virus-Related OSHA Citation Goes to Georgia Nursing Home*, BLOOMBERG L. (May 29, 2020, 4:24 PM), <https://news.bloomberglaw.com/safety/first-virus-related-osha-citation-goes-to-georgia-nursing-home?context=search&index=3> [<https://perma.cc/2ZSB-KPHN>]; The Editorial Board, *supra* note 95. For one example of workers' frustration with OSHA, see generally Complaint, *Jane Does v. Scalia*, No. 1:02-at-06000-UN (M.D. Pa. July 22, 2020) (alleging that employer did not provide adequate PPE or social distancing on the line, or inform workers of those who were sick, and also incentivized sick workers to come to work; that plaintiff repeatedly contacted OSHA with complaints and demands for action, including filing an imminent danger complaint; and that OSHA never visited the plant, but responded by phone stating that it will not treat any complaint regarding COVID-19 as an imminent danger complaint).

accompanying fine, while making it easier for employers not to report their workers' COVID-19-related hospitalizations and deaths.<sup>98</sup> It is hard to overstate the extent of this abdication during the first six months of the pandemic by the very federal agency charged with protecting the health and safety of workers.

While OSHA issued a handful of subsequent citations in early September — to two meatpacking plants and several healthcare facilities — for failure to protect workers from the coronavirus,<sup>99</sup> the limited nature of these citations, the de minimis remedies, and the belated timing are all problematic. To take one example, the agency cited Smithfield Foods under the General Duty Clause for failing to provide a safe workplace at its South Dakota plant, where nearly 1,300 workers contracted the virus starting in mid to late March, over 40 were hospitalized, and four have died.<sup>100</sup> The

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98. See Bruce Rolfsen, *OSHA Overhauls Guidance for Reporting Virus Hospitalizations (I)*, BLOOMBERG L.: OCCUPATIONAL SAFETY & HEALTH REP. (Oct. 1, 2020, 5:01 PM), <https://news.bloomberglaw.com/safety/osha-again-revises-guidance-for-reporting-virus-hospitalizations> [https://perma.cc/DHA4-SW2Y]. Employers must now report employee hospitalization due to COVID-19 within 24 hours of learning *both* that the employee had been hospitalized *and* that the reason for hospitalization was a *work-related case* of COVID-19. In reversing its previous requirement that employers report hospitalizations within 24 hours of when the employee was *diagnosed* as having the virus, OSHA made it easier for employers to avoid reporting based on their asserted lack of knowledge that work-related exposure was a cause. See Sheila Mulrooney Eldred, *Healthcare Workers Implore OSHA for More Oversight on COVID-19 Safety*, MEDSCAPE (Oct. 23, 2020), <https://www.medscape.com/viewarticle/939726> [https://perma.cc/PWG3-752C].

99. See *Archive of U.S. Dep't of Labor Press Releases*, DEP'T LABOR, <https://www.dol.gov/newsroom/releases?agency=All&state=All&topic=All&year=all&page=0> [https://perma.cc/YA6R-9TAK] (last visited Oct. 4, 2020) (listing DOL press releases on September 10–11, 2020, that report OSHA citations against three healthcare facilities in New Jersey and Louisiana for violating regulations on PPE and respirators, and two meatpacking plants in Colorado and South Dakota for General Duty Clause violations; fines assessed range from \$9,639 to \$28,070 for the violations). As of mid-October, OSHA issued more citations to healthcare facilities and nursing homes, principally for violation of regulations on providing personal protective equipment including particularly establishing and implementing respiratory protections. See 29 C.F.R. §§ 1910.132, 1910.134. The average assessed fine is \$14,378 per violation. See Press Release, U.S. Dep't of Lab., Occupational Safety & Health Admin., U.S. Department of Labor's OSHA Announces \$1,222,156 in Coronavirus Violations (Oct. 16, 2020), <https://www.osha.gov/news/newsreleases/national/10162020> [https://perma.cc/YJL4-T639] (OSHA announcement of \$1,222,156 in coronavirus violations for 85 establishments).

100. See Citation and Notification of Penalty from Sheila Stanley, Area Dir., Occupational Safety & Health Admin., to Smithfield Packaged Meats Corp. 6 (Sept. 8, 2020) [hereinafter *Smithfield Citation*] (copy on file with author); Jacob Bunge, *U.S. Regulators Fine Pork Giant Smithfield over Covid-19 Outbreak*, WALL ST. J. (Sept. 10, 2020, 6:18 PM), <https://www.wsj.com/articles/u-s-regulators-fine-pork-giant-smithfield-over-covid-19-outbreak-11599776324> [https://perma.cc/8EJA-4E83]; Jeremy Fugleberg, *OSHA Fines Smithfield Foods \$13,494 for Not Protecting South Dakota Workers from COVID-19, Faces Backlash from Company and Workers*, DULUTH NEWS TRIB. (Sept. 10, 2020, 1:00 PM), <https://www.duluthnewstribune.com/newsmd/coronavirus/6655554-OSHA-fines-Smithfield>



agency issued a citation for a single serious violation, almost six months after the onset of this massive number of infections, and nearly five months after the plant had closed for an extended period at the urging of state and local officials.<sup>101</sup>

The proper unit of prosecution under the General Duty Clause is a violative hazardous condition rather than each individual employee's exposure to the violative condition.<sup>102</sup> That said, the single Smithfield citation identified multiple failures to mitigate exposures to the COVID-19 virus,<sup>103</sup> and these failures likely would have justified a series of citations addressing distinct operations or venues within the company's eight-story facility employing 3,700 workers.<sup>104</sup> Further, the Smithfield citation does not discuss the lack of training for the largely immigrant workforce regarding how to practice social distancing on fast-moving production lines, how to use face masks or shields, or how to prepare for and understand any testing procedures to be administered.<sup>105</sup> Failure to provide training as required under a workplace safety standard has been cited as separate violations on a per-employee basis.<sup>106</sup> Thus, instead of assessing a fine of just under

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-Foods-13494-for-not-protecting-South-Dakota-workers-from-COVID-19-faces-backlash-from-company-and-workers [<https://perma.cc/9URU-KK6C>].

101. *See* Bunge, *supra* note 100; Fugleberg, *supra* note 100.

102. *See* Reich v. Arcadian Corp., 110 F.3d 1192, 1196–97 (5th Cir. 1997).

103. *See* Smithfield Citation, *supra* note 100, at 6–7 (discussing eight distinct measures of proactive social distancing related to different areas in the plant, mandatory employee use of protective measures, and required employee screenings accompanied by written explanations in different languages).

104. Large meatpacking plants typically involve operations related to immobilizing, killing, deboning, chilling, and packaging. *See* U.S. ENV'T PROT. AGENCY, AIR EMISSIONS FACTORS AND QUANTIFICATION, MEAT PACKING PLANTS ch. 9.5.1 (1997), <https://www3.epa.gov/ttn/chief/ap42/ch09/final/c9s05-1.pdf> [<https://perma.cc/7EVQ-B8NP>] (including a generic process flow diagram and description for meatpacking operations). For plant size and worker population at Smithfield, see Jessica Lussenhop, *Coronavirus at Smithfield Pork Plant: The Untold Story of America's Biggest Outbreak*, BBC NEWS (Apr. 17, 2020), <https://www.bbc.com/news/world-us-canada-52311877> [<https://perma.cc/DB3D-JB9P>].

105. *See* Smithfield Citation, *supra* note 100, at 6–8 (discussing various means of hazard abatement without addressing the need for employee training in these areas). The workforce at Smithfield consists largely of immigrants and refugees from, inter alia, Myanmar, Ethiopia, Nepal, Congo, and El Salvador. The workers speak 80 different languages. *See* Lussenhop, *supra* note 104.

106. *See* Nat'l Ass'n of Home Builders v. Occupational Safety & Health Admin., 602 F.3d 464, 466–68 (D.C. Cir. 2010) (upholding a standard specifying that “each failure to train an employee may be considered a separate violation” and distinguishing *Reich v. Arcadian Corp.*, 110 F.3d 1192 (5th Cir. 1997), which involved the General Duty Clause and not standards promulgated by the Secretary of Labor). The three citations at healthcare facilities, referenced *supra* note 99, are for failure to provide employees with respirators, failure to implement a respiratory protections program, and failure to provide appropriate PPE. *See* Press Release, U.S. Dep't of Lab., U.S. Department of Labor Cites Hackensack Meridian Health in North Bergen, New Jersey, for Failing to Protect Employees from Coronavirus

\$14,000 for a single “serious” violation, OSHA could have better fulfilled its responsibility by charging the company with multiple General Duty Clause violations across distinct plant operations, and perhaps also per-employee violations for lack of training — leading to assessed fines more commensurate with the catastrophic nature of the problems at this plant.<sup>107</sup>

Finally, even a single General Duty Clause citation issued in March or early April would have sent a message not only to Smithfield, but to other meatpacking plants around the country. Yet despite media coverage and worker complaints at the time reporting extensive virus outbreaks in these plants, which were operating without social distancing and PPE protections, OSHA declared the plants posed no imminent danger to workers, and the agency declined to perform on-site inspections at any meatpacking plant until the middle of May.<sup>108</sup> The agency then waited until its six month statute of limitations was about to lapse from the March worker complaints before issuing a single citation to Smithfield.<sup>109</sup> The agency’s course of conduct

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(Sept. 11, 2020), <https://www.dol.gov/newsroom/releases/osha/osha20200911-0> [<https://perma.cc/58H8-2AU7>]; Press Release, U.S. Dep’t of Lab., U.S. Department of Labor Cites New Jersey Hospital for Failing to Protect Workers from the Coronavirus (Sept. 11, 2020), <https://www.dol.gov/newsroom/releases/osha/osha20200911-2> [<https://perma.cc/3BW6-RMYH>]. Assuming multiple employees were endangered by each violation, the violations could have been cited per employee rather than on a facility-wide basis.

107. The maximum penalty for each serious violation of the Act is \$13,494. *See* 29 U.S.C. § 666(b); *see also* *Civil Money Penalty Inflation Adjustments*, DEP’T LABOR, <https://www.dol.gov/agencies/whd/resources/penalties> [<https://perma.cc/2D22-PM54>] (last visited Oct. 21, 2020) (although the statute states the penalty is up to \$7,000 per serious violation, the fine is \$13,494 accounting for inflation). Thus, pursuing citations for five or six distinct violations of the General Duty Clause might have resulted in penalties between \$65,000 and \$80,000. Pursuing citations for serious violations in failing to train scores, if not hundreds, of employees might have resulted in penalties closer to \$1 million. All of this assumes the violations at Smithfield, which allegedly persisted for weeks, were never more than serious. If the agency had assessed any of the violations as willful or repeat rather than just serious, OSHA penalties could have been as high as \$134,937 for each violation. *See id.*

108. *See* Noam Scheiber, *OSHA Criticized for Lax Regulation of Meatpacking in Pandemic*, N.Y. TIMES (Oct. 22, 2020), <https://www.nytimes.com/2020/10/22/business/economy/osha-coronavirus-meat.html> [<https://perma.cc/5UCT-A4MZ>].

109. *See* Kimberly Kindy, *More Than 200 Meat Plant Workers in the U.S. Have Died of COVID-19. Federal Regulators Just Issued Two Modest Fines.*, WASH. POST (Sept. 13, 2020, 9:49 AM), [https://www.washingtonpost.com/national/osha-covid-meat-plant-fines/2020/09/13/1dca3e14-f395-11ea-bc45-e5d48ab44b9f\\_story.html?hpid=hp\\_hp-banner-main\\_meat-plant-10am%3Ahomepage%2Fstory-ans](https://www.washingtonpost.com/national/osha-covid-meat-plant-fines/2020/09/13/1dca3e14-f395-11ea-bc45-e5d48ab44b9f_story.html?hpid=hp_hp-banner-main_meat-plant-10am%3Ahomepage%2Fstory-ans) [<https://perma.cc/J5PK-9G7V>] (citing to the widespread media reports in March and April, and OSHA’s response on timing that the agency “met legal mandates because it has ‘a six month statute of limitations to complete any investigation and issue a citation’”).

leaves considerable doubt about its commitment to protecting essential workers, most at risk for COVID-19, in suitably immediate terms.<sup>110</sup>

Once again, some states have attempted to fill the substantial federal gap in regulation and enforcement. As noted earlier, California has acted to make the CDC Guidelines mandatory.<sup>111</sup> And in July 2020, Virginia became the first state to issue an ETS addressing COVID-19 infectious disease prevention.<sup>112</sup> The state took action through its 14-member health and safety board after thousands of complaints filed since March and large-scale outbreaks at two poultry-processing plants.<sup>113</sup> The governor's office added that it was responding to OSHA's prolonged lack of enforcement regarding COVID-19.<sup>114</sup>

The Virginia standard sets forth requirements *for all employers*, encompassing the private and state and local public sectors. These requirements include conducting workplace assessments focused on COVID-19 exposure risks; devising and implementing requirements for social distancing on the job and during breaks; providing access to sufficient handwashing and related sanitation and disinfectant facilities; ensuring that employees can see their COVID-19-related exposure and medical records; developing test-based or symptom-based strategies to enable infected employees to return to work; and prohibiting discrimination against any employees for exercising rights under the standard, wearing their own PPE if not provided by the employer, or raising a reasonable concern about infection control at the workplace.<sup>115</sup>

The ETS includes an added set of detailed requirements involving engineering controls and administrative and work practice controls for

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110. *See id.* (reporting strong concerns expressed by numerous workers' representatives, citing the agency's rebuff to their requests for meetings in March and April, and criticizing the de minimis nature of citation and fines as effectively an incentive for plants to continue hazardous operations).

111. *Cal/OSHA Interim General Guidelines on Protecting Workers from COVID-19*, *supra* note 79 (Title 8 § 3203 requires employers to establish an Injury and Illness Prevention Program (IIPP), and IIPP must be adopted to prevent COVID-19).

112. VA. DEP'T LAB. & INDUS., VAC25-220, EMERGENCY TEMPORARY STANDARD INFECTIOUS DISEASE PREVENTION: SARS-CoV-2 VIRUS THAT CAUSES COVID-19, at 16 (2020) [hereinafter VA. ETS], <https://www.doli.virginia.gov/wp-content/uploads/2020/07/RIS-filed-RTD-Final-ETS-7.24.2020.pdf> [<https://perma.cc/HLM5-VRXE>] (as adopted by the Safety and Health Codes Board, July 15, 2020).

113. *See* Eli Rosenberg, *Virginia Adopts Nation's First Coronavirus Workplace Safety Rules After Labor Groups Decry Federal Inaction*, WASH. POST (July 15, 2020, 4:48 PM), <https://www.washingtonpost.com/business/2020/07/15/coronavirus-workplace-regulation-safety-virginia/> [<https://perma.cc/L9VG-JYZJ>].

114. *See id.*

115. *See* VA. ETS, *supra* note 112, at 14–20, 34. The Standard's coverage of private and public employers is set forth in VA. ETS § 10(C). *See id.* at 2.

employers, and provision of PPE and training on hazard recognition and prevention for employees. These additional requirements are linked to hazards or job tasks classified as *very high* or *high exposure risk*, with a parallel set of engineering, administrative, PPE, and training requirements for hazards or job tasks classified as *medium exposure risk*.<sup>116</sup> The definitions section of the ETS identifies occupations within these categories. High-exposure jobs in the context of COVID-19 include healthcare delivery and support services, first-responder services, and medical transport services.<sup>117</sup> Medium exposure jobs may include, but are not limited to, employees working in poultry, meat, and seafood processing; agriculture and hand labor; grocery stores, convenience stores, and food banks; drug stores and pharmacies; and correctional facilities.<sup>118</sup> Employers who violate the standard may be fined up to \$13,000; willful and repeat violators face penalties of up to \$130,000.<sup>119</sup>

The Virginia ETS represents an important step forward given the absence of leadership from the federal government. Nonetheless, Virginia is a truly exceptional instance; only one other state has indicated an interest in such an initiative,<sup>120</sup> and with OSHA's refusal to act, there remains a huge gap in the ability to require and enforce meaningful protections.

#### D. Hazard Pay

FE workers who are healthcare providers; healthcare support workers; and first responders, such as police and firefighters, face especially high risks of exposure to COVID-19 on a persistent and hazardous basis. As noted earlier, FE workers employed at grocery, convenience, or drug stores; building cleaning services; and childcare and social services are likely to earn low incomes and experience severe financial straits as they interact with customers, clients, and each other in confined spaces.<sup>121</sup> In these

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116. *See id.* at 22–26, 32.

117. *See id.* at 8–9.

118. *See id.*

119. *See* Alex Gangitano, *Virginia Becomes First State to Issue Work Safety Standards for Coronavirus*, HILL (July 15, 2020, 4:43 PM), <https://thehill.com/news-by-subject/labor/507531-virginia-becomes-first-state-to-issue-standard-for-worker-protections> [<https://perma.cc/V86L-B6EG>]; Rosenberg, *supra* note 113.

120. Oregon announced its intention to promulgate an ETS on COVID-19 and airborne infectious disease by September 2020, to be effective until early 2021, and then replaced by a permanent standard. The state has revised its timeline, projecting an ETS in October followed by a proposed permanent standard with a public comment period lasting until March 15, 2021. *See Potential Oregon OSHA Rulemaking Timeline: COVID-19/Infectious Diseases*, OR. OCCUPATIONAL SAFETY & HEALTH (Oct. 5, 2020), <https://osha.oregon.gov/rules/advisory/infectiousdisease/Documents/Infectious-Disease-Public-Timeline.pdf> [<https://perma.cc/9WWD-28ZK>].

121. *See supra* notes 36–37 and accompanying text.

circumstances, FE workers have argued that in providing critical services for the country, and risking their personal and family health to do so, the market and government should recognize and compensate for their sacrifice.

A few large companies such as Amazon, Kroger, and Target initiated voluntary hazard pay policies in the first weeks of the pandemic. But they discontinued the pay increases by the end of May, although some later added extensions for employees working through June or July.<sup>122</sup> Those hazard pay premiums compensated workers with no real choice but to come to work at a time when the rest of the country was shut down. While many jobs have returned, the health risks of being a meatpacking worker, grocery store cashier, or home healthcare provider remain high. Given that millions are out of work for the foreseeable future, lower-paid FE workers have little choice but to continue without a hazard pay premium, especially because most employees who decide to quit are not eligible for unemployment benefits.<sup>123</sup> As one economist explained, “[i]f you’re an essential worker, there’s no other job than the job you currently have . . . [you’re] basically forced labor.”<sup>124</sup> Unions have succeeded in negotiating hazard pay for FE workers at specific plant locations and in a handful of company-wide collective bargaining agreements,<sup>125</sup> but such agreements are limited to settings where unions have sufficient bargaining strength to prevail in the current exigent circumstances.

Legislative proposals on hazard pay for private-sector FE workers have not been approved by Congress and have not fared especially well in state legislatures.<sup>126</sup> Some states and local governments have enacted short-term

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122. See Anders Melin & Ben Steverman, *Essential Workers Are Losing Their ‘Hazard Pay’ Even as the Pandemic Rages On*, TIME (May 14, 2020, 8:17 AM), <https://time.com/5836736/essential-workers-hazard-pay/> [<https://perma.cc/FN5B-LZ9V>]; Michael Williams, *Which Chains Are Still Paying Workers a Pandemic Premium?*, TIMES UNION (July 9, 2020, 5:28 PM), <https://www.timesunion.com/business/article/Which-chains-are-still-paying-their-employees-15397586.php> [<https://perma.cc/R8ZV-4FPV>].

123. Jack Healy, *Workers Fearful of the Coronavirus Are Getting Fired and Losing Their Benefits*, N.Y. TIMES (June 10, 2020), <https://www.nytimes.com/2020/06/04/us/virus-unemployment-fired.html> [<https://perma.cc/H46A-548R>].

124. Melin & Steverman, *supra* note 122 (quoting Columbia University economics professor Suresh Naidu).

125. See *infra* Section II.F (discussing agreements reached with large supermarket chains, certain meatpacking plants, and a major telecommunications company).

126. See The Health & Economic Recovery Omnibus Emergency Solutions Act, H.R. 6800, 116th Cong. (as approved by House, May 15, 2020). The HEROES Act, passed by the House in May but never taken up by the Senate, provides for hazard pay to a range of public-facing workers in essential industries, in the form of a \$13 hourly pay premium (up to \$10,000) from the start of the pandemic until 60 days after the last day of the public health emergency. See *Fact Sheet: Health and Economic Recovery Omnibus Emergency Solutions*

hazard pay or hazard stipends for identified public-sector employees, often linked to negotiated arrangements with unions representing those workers. The amounts involved range from relatively modest to quite substantial. Examples at the state level include hazard pay for correctional workers in Maine, Ohio, and Michigan; police and other first responders in New Hampshire and Washington DC; and certain healthcare workers in Massachusetts and Maine.<sup>127</sup> Local governments have enacted similar temporary measures, including in regions of the country where unions do not represent public-sector workers.<sup>128</sup>

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*Act (HEROES Act - H.R. 6800)*, INT'L BROTHERHOOD TEAMSTERS (June 2020), <https://teamster.org/wp-content/uploads/2020/06/HEROES-Act-fact-sheet-revised.pdf> [<https://perma.cc/KT75-M64X>]. In Wyoming, the legislature rejected, without any discussion, a proposed hazard pay bill for employees at risk of contracting COVID-19. See Nick Reynolds & Morgan Hughes, *With No Discussion, Legislature Rejects Hazard Pay for State Employees*, CASPER STAR TRIB. (June 21, 2020), [https://trib.com/news/state-and-regional/govt-and-politics/with-no-discussion-legislature-rejects-hazard-pay-for-state-employees/article\\_e3079ae-43d8-547d-a8a3-6010dfe7a752.html](https://trib.com/news/state-and-regional/govt-and-politics/with-no-discussion-legislature-rejects-hazard-pay-for-state-employees/article_e3079ae-43d8-547d-a8a3-6010dfe7a752.html) [<https://perma.cc/GY5L-9JFT>]. Louisiana has enacted a law providing one-time hazard pay checks of \$250 for workers who certify they worked 200 front-line hours between March 22 and May 14. The limited funding is available first-come first-served to law enforcement and healthcare personnel, but also to some private-sector FE workers, such as grocery store and mortuary employees. See Ashley White, *How Louisiana Frontline Workers Can Apply for the \$250 Coronavirus 'Hazard Pay'*, LAFAYETTE DAILY ADVERTISER (Aug. 5, 2020, 6:56 PM), <https://www.theadvertiser.com/story/news/2020/07/14/how-apply-louisiana-hazard-pay-front-line-workers-coronavirus/5428664002/> [<https://perma.cc/2W4T-CEU9>].

127. On the modest side are D.C.'s addition of \$14 per diem for all employees required to come to work, continuing as long as the District can afford it, and Maine's temporary increase of \$3 to \$5 per hour for workers in state mental health and correctional facilities. See Abigail Constantino, *DC Authorizes Hazard Pay for Workers Who Must Physically Report to Work*, WTOP (Apr. 14, 2020, 11:54 PM), <https://wtop.com/dc/2020/04/dc-authorizes-extra-pay-for-workers-who-must-physically-report-to-work/> [<https://perma.cc/DE58-ZNVK>]; *Maine Governor to Provide Hazard Pay to State Corrections and Mental Health Workers*, AFSCME COUNCIL 93 (Apr. 5, 2020), [http://www.afscme93.org/2020/04/05/blogpost/maine-governor-to-provide-hazard-pay-to-state-corrections-and-mental-health-workers/?fbclid=IwAR030Nas0FhJ4tAoi18xqhkWLCUOomolYGpveaYPi2rMjEhQ\\_dLExrWA8Q0](http://www.afscme93.org/2020/04/05/blogpost/maine-governor-to-provide-hazard-pay-to-state-corrections-and-mental-health-workers/?fbclid=IwAR030Nas0FhJ4tAoi18xqhkWLCUOomolYGpveaYPi2rMjEhQ_dLExrWA8Q0) [<https://perma.cc/9V23-ZE95>]. More substantial provisions are New Hampshire's addition of \$300 per week for full-time and \$150 per week for part-time employees working as police officers, firefighters, EMTs, corrections officers, and other first responders, and Michigan's \$750 premium per biweekly pay period for corrections officers. See James David Dickson, *Mich. COs Get Hazard Pay, Dispute Use of Sick Time for Quarantines*, CORRECTIONS1 (Apr. 12, 2020), <https://www.corrections1.com/coronavirus-covid-19/articles/mich-cos-get-hazard-pay-dispute-use-of-sick-time-for-quarantines-cNVnQ6TC85ZJ2ott/> [<https://perma.cc/SM2U-5LPY>]; Laura French, *Local Governments Providing Hazard Pay, Stipends for First Responders*, CORRECTIONS1 (May 27, 2020), <https://www.corrections1.com/coronavirus-covid-19/articles/local-governments-providing-hazard-pay-stipends-for-first-responders-Oe7UtiA42phouiP4/> [<https://perma.cc/4EKF-AWKK>].

128. For example, Forsyth County in Georgia approved hazard pay for employees at risk of exposure, including an additional \$500 monthly payment for employees in contact with the

These successful efforts reflect recognition from elected representatives that public-sector FE workers deserve special compensation for the health risks they bear. Still, the hazard payments expire within a relatively short time frame,<sup>129</sup> although the heightened risks associated with their FE positions will continue for months, if not years, to come. And for private-sector FE workers, who are lower-paid and less likely to be represented by unions, there has been no hazard pay beyond what a few large employers granted and then withdrew in the initial weeks and months of the pandemic, or what has been negotiated in a handful of union settings.

### E. Whistleblower Protections and Rights to Refuse Unsafe Work

Absent regulatory standards or requirements in the face of COVID-19, some protections are available for FE workers seeking to avoid extraordinary risks to their health. Perhaps most directly relevant is OSHA's whistleblower provision, protecting employees against discharge or discrimination for exercising their rights under the Act.<sup>130</sup> Yet of 1,744 COVID-19-related retaliation complaints filed by workers from the start of the pandemic through mid-August, OSHA docketed just one in five for any investigation and resolved only 2% (35 of 1,744) in this period covering more than five months — it is not known whether those were resolved in a manner that benefited the workers.<sup>131</sup>

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public and \$250 monthly payment for employees who cannot socially distance or must enter private residences. See Kelly Whitmire, *Forsyth County Commits to COVID-19 Hazard Pay for Employees*, FORSYTH CNTY. NEWS (Apr. 22, 2020, 1:23 PM), <https://www.forsythnews.com/news/government/forsyth-county-commits-covid-19-hazard-pay-employees/> [<https://perma.cc/49CV-5ABH>]. Boaz City Council in Alabama enacted hazard pay in the amount of \$200 a month for first responders who come into contact with others while working. See Stefante Randall, *Boaz First Responders Receive Hazard Pay Amid COVID-19 Pandemic*, WAFF48 (Apr. 29, 2020, 11:37 PM), <https://www.waff.com/2020/04/29/boaz-first-responders-receive-hazard-pay-amid-covid-pandemic/> [<https://perma.cc/F459-5KX7>].

129. Michigan hazard pay provisions expired when the governor lifted the stay-at-home order, while the New Hampshire pay was set to expire at the end of June 2020. See Kevin Landrigan, *Extra Pay, Expanded Testing for Front-Line Workers*, N.H. UNION LEADER (Apr. 15, 2020), [https://www.unionleader.com/news/health/coronavirus/extra-pay-expanded-testing-for-front-line-workers/article\\_dc175d03-1dcc-5b13-b05c-d31348fc66c5.html](https://www.unionleader.com/news/health/coronavirus/extra-pay-expanded-testing-for-front-line-workers/article_dc175d03-1dcc-5b13-b05c-d31348fc66c5.html) [<https://perma.cc/B2NM-XLZ7>]. The provisions enacted by Boaz County Council last until all employees return to working normal hours, while the Forsyth Country premium expired after six pay periods. See Whitmire, *supra* note 128; Kerry Yencer, *Boaz Council OK Hazard Pay for Police and Fire Employees*, GADSDEN TIMES (Apr. 14, 2020, 4:19 PM), <https://www.gadsdentimes.com/news/20200414/boaz-council-ok-hazard-pay-for-police-and-fire-employees> [<https://perma.cc/8SHM-LMQD>].

130. See 29 U.S.C. § 660(c).

131. See Deborah Berkowitz & Shayla Thompson, *OSHA Must Protect COVID Whistleblowers Who File Retaliation Complaints*, NAT'L EMP. L. PROJECT (Oct. 8, 2020),

Private-sector employees who report safety and health violations or dangers may be protected from retaliation under other whistleblower statutes enacted at both federal and state levels. A wide range of federal laws includes anti-retaliation provisions, although these provisions focus on employee participation in investigations or enforcement proceedings rather than specifically referencing safety or health issues.<sup>132</sup>

The Supreme Court has cast serious doubt on the extent to which these laws protect undocumented workers — a notable segment of the FE population — when they claim retaliation for reporting workplace violations.<sup>133</sup> A potential alternative source of support for undocumented workers is the U-Visa, which grants non-immigrant status (including work authorization) to immigrants who have assisted in specific law enforcement matters.<sup>134</sup> However, while some workplace-related crimes qualify for U-Visa certification, DOL has limited its certification authority to wage and hour violations, thus excluding workers who provide assistance in investigating or prosecuting safety and health violations.<sup>135</sup>

State laws offer safeguards to whistleblowers who are FE workers, but the safeguards rely on varying legal standards that highlight the absence of a uniform federal approach. A number of states specify that private- or public-sector employees must demonstrate an actual violation of safety and health law by their employer in order to be protected from retaliation.<sup>136</sup> These

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<https://www.nelp.org/publication/osha-failed-protect-whistleblowers-filed-covid-retaliation-complaints/> [<https://perma.cc/9CJF-F4SM>]. On the indeterminate nature of the 35 resolved complaints, the authors explain that OSHA does not make outcomes public or explain any settlements it has reached. *See id.*

132. *See, e.g.*, Migrant and Seasonal Agricultural Workers Protection Act, 29 U.S.C. § 1855 (protecting workers from retaliation for exercising “with just cause” any right or protection under the Act); 42 U.S.C. § 2000e-3(a) (protecting against retaliation for making charges or assisting in enforcement proceedings under Title VII); The federal Whistleblower Protection Act explicitly applies when an employee reports information she “reasonably believes evidences . . . a substantial and specific danger to public health or safety.” 5 U.S.C. § 1213(a)(1)(B). This law, however, covers only federal government employees.

133. *See Hoffman Plastics Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) (denying relief to undocumented worker discharged in violation of NLRA). Lower courts are divided as to whether undocumented workers are protected under Title VII. *Compare Egbuna v. Time-Life Librs., Inc.*, 153 F.3d 184 (4th Cir. 1998) (en banc) (not covered against retaliation claims), *with Iweala v. Operational Techs. Servs., Inc.*, 634 F. Supp.2d 73 (D.D.C. 2009) (covered).

134. *See* 8 U.S.C. § 1101(a)(15)(U)(iii) (setting forth criminal activities for which immigrants who provide prosecutorial assistance may be eligible for U-Visa certification). U nonimmigrant status has been available pursuant to U.S. Department of Health & Human Services regulations since 2007. *See Rachel Nadas, Justice for Workplace Crimes: An Immigration Law Remedy*, 19 HARV. LATINO L. REV. 137, 150 (2016).

135. *See Nadas, supra* note 134, at 153–54.

136. *See, e.g.*, FLA. STAT. ANN. § 448.102(3) (applied in *Graddy v. Wal-Mart Stores E., LP.*, 237 F. Supp. 3d 1223, 1226–28 (M.D. Fla. 2017)); N.Y. LAB. LAW § 740(2)(a)



laws offer no real protection unless the state has imposed safety and health requirements linked to COVID-19 exposure on employers. Other states apply a less stringent standard, requiring whistleblowing employees to demonstrate an objectively reasonable belief that there was a safety or health violation.<sup>137</sup> And protections for whistleblowers employed at healthcare facilities may be somewhat stronger if the workers complain in good faith about unsafe working conditions, improper quality of care, or violations of a statute or rule.<sup>138</sup>

All of these state and federal laws come into play only after an employee has been retaliated against — almost invariably by termination. In order to prevail in a retaliation claim, the worker likely must establish that termination was due to the specific and objectively supported assertion of a danger to public safety or health. Employees may be reluctant to risk job security by reporting on such dangers, especially during a period of large-scale unemployment and economic uncertainty. Such reluctance would appear reasonable with respect to COVID-19, given that the CDC and OSHA have failed to designate specific workplace practices as mandatory to protect against safety and health dangers, and with few exceptions, the states have followed the federal government's purely advisory lead. Seeking protection from OSHA seems especially futile, inasmuch as the DOL Office of Inspector General has reported on the agency's inadequate job of processing COVID-19-related and other whistleblower complaints.<sup>139</sup> Finally, anti-retaliation provisions following a termination have provided meager protection for low-wage workers such as those serving in most FE occupational areas.<sup>140</sup>

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(McKinney 2019) (applied in *Bordell v. Gen. Elec. Co.*, 622 N.Y.S.2d 1001, 1002 (App. Div. 1995)).

137. See, e.g., CAL. LAB. CODE §§ 1102(5)(b), 6310 (West 2016); N.J. STAT. ANN. § 34:19-3(a)(1) (West 2006). For COVID-19-related complaints recently filed under the New Jersey whistleblower provision, see Complaint at 7–8, *Rossi v. Alberti*, CAM-L-001864-20 (N.J. Super. Ct. June 1, 2020); Complaint ¶¶ 117–38, *Leibovitz v. Hope Cmty. Charter Sch. Found.*, CAM-L-001891-20 (N.J. Super. Ct. June 3, 2020).

138. See, e.g., MICH. COMP. LAWS § 333.20180 (West 2002); WASH. REV. CODE § 43.70.075 (2019).

139. See Vin Guerrerri, *OSHA Whistleblower Claims Jump Amid Virus, Watchdog Says*, LAW360 (Aug. 18, 2020, 10:00 PM), <https://www.law360.com/articles/1302387/osha-whistleblower-claims-jump-amid-virus-watchdog-says> [<https://perma.cc/T4TB-8QCA>]; see also *supra* text accompanying note 131 (discussing 1,744 COVID-19-related retaliation complaints filed with OSHA).

140. This is partly because their limited monetary stakes make it difficult for these workers to attract interested and workplace-experienced counsel, but also because mandatory arbitration provisions result in contests against well-resourced employers who may well be repeat players with an arbitrator. See Alexander Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?*, 11 EMP. RTS. & EMP. POL'Y J. 405, 445

Apart from post-hoc efforts to respond to retaliatory termination, FE workers also may have certain rights to refuse unsafe work. There are three sources for such a right under federal law. One is a regulation promulgated in the early years of the Occupational Safety and Health (OSH) Act. The employee must have a reasonable apprehension of “a real danger of death or serious injury,” ordinarily have sought but “been unable to obtain[] a correction of the dangerous condition” from his employer, and resort to normal statutory enforcement channels must be shown to be ineffective “due to the urgency of the situation.”<sup>141</sup> This OSH Act protection is far more limited than a right to walk off the job based on potential unsafe conditions.<sup>142</sup> FE workers unable to persuade their employers to correct serious COVID-19-related exposures may be unwilling to risk being suspended or fired on the chance that their refusal will be found objectively reasonable many months later. Their reluctance may be even stronger given that they have no private right of action: only the Secretary of Labor is authorized to bring a civil action to vindicate refusal to work under the regulation.<sup>143</sup>

A second possible federal avenue of protection for refusing unsafe work is Section 7 of the National Labor Relations Act (NLRA). Section 7 gives employees a right to engage in concerted activity for mutual aid or protection, including to protect against what they perceive to be working conditions endangering their safety and health, without being subject to employer reprisal.<sup>144</sup> However, if the workers are covered under a collective agreement that contains a no-strike clause, this is likely to prohibit a concerted refusal to work during the life of the agreement.<sup>145</sup> Further, employers confronting a collective refusal to work under assertedly unsafe

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(2007); Alexander Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 BERKELEY J. EMP. & LAB. L. 71, 83–85 (2014).

141. 29 C.F.R. § 1977.12(b)(2). The Supreme Court upheld this regulation as consistent with the statute in *Whirlpool Corp. v. Marshall*, 445 U.S. 1 (1980).

142. *See* 29 C.F.R. § 1977.12(b)(1) (making this point in express terms).

143. *See id.* § 660(c)(2).

144. *See id.* § 157; *see, e.g.*, *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 12–13 (1962) (applying protected right to employees walking off job in non-union setting); *see also* *NLRB v. Tamara Foods, Inc.*, 692 F.2d 1171, 1176 (8th Cir. 1982) (upholding as concerted and protected activity refusal of non-union employees to work because they believed that ammonia fumes posed a danger; subsequent employer discipline violated the NLRA); *Matsu Corp.*, 368 N.L.R.B. No.16 (June 28, 2019) (ordering reinstatement with backpay for employees who were discharged for concertedly refusing to work an extra shift because of health and safety concerns).

145. *See* *Boys Markets, Inc. v. Retail Clerks Union Local 770*, 398 U.S. 235, 247–49, 253–54 (1970). In addition, unionized employees at healthcare institutions are required to give ten days’ notice “before engaging in any strike, picketing, or other concerted refusal to work.” 29 U.S.C. § 158(g); *see also* *Minn. Licensed Prac. Nurses Ass’n v. NLRB*, 406 F.3d 1020, 1023–24 (8th Cir. 2005).

conditions, especially a refusal that extends over a period of time, are permitted to hire permanent replacements for these employees.<sup>146</sup>

The third federal source of protection is Section 502 of the Labor Management Relations Act. Section 502 allows unionized workers to avoid the aforementioned restrictions of a collectively bargained no-strike clause by providing that an individual or collective refusal to work “in good faith because of abnormally dangerous conditions for work” is not classified as a strike.<sup>147</sup> In 1999, the National Labor Relations Board (NLRB) held that a work stoppage is protected under Section 502 if: (i) “the employees believed in good-faith that their working conditions were abnormally dangerous;” (ii) “that their belief was a contributing cause of the work stoppage;” (iii) “that the employees’ belief is supported by ascertainable, objective evidence;” and (iv) “that the perceived danger posed an immediate threat of harm to employee health or safety.”<sup>148</sup> The key elements of this test — a subjective good faith belief, supported by some objective evidence, and the immediacy of the threat — seem likely to justify FE workers refusing to participate under a range of COVID-19-related workplace conditions. At the same time, the Board’s 1999 legal standard is open to reconsideration in the current setting if challenged by businesses seeking a more employer-friendly interpretation of Section 502. Such a challenge seems quite possible in the COVID-19 context, given a conservative NLRB, and an arguable tension between the 1999 “good faith” test and language in an earlier Supreme Court decision suggesting a stricter standard.<sup>149</sup>

State law has responded to whether employees may refuse what they regard as unsafe work in the COVID-19 setting.<sup>150</sup> This response, however, has not been directed primarily at the hazards confronting FE workers.

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146. *See, e.g.*, *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345–46 (1938) (stating that an employer who decides to permanently replace lawful strikers in order to protect and continue his business does not engage in an unlawful reprisal).

147. 29 U.S.C. § 143. This provision may be asserted on behalf of an individual worker, but its greater impact on labor law is when invoked by a group of workers. Because this collective refusal to engage in unsafe work is not treated as a strike, the workers may not be permanently replaced under *Mackay Radio*.

148. *TNS, Inc.*, 329 N.L.R.B. 602, 603 (1999). Although a court of appeals denied enforcement of the Board’s order on other factual grounds, it endorsed the test quoted above, largely based on deference to the reasonableness of the agency’s judgment. *See TNS, Inc. v. NLRB*, 296 F.3d 384, 391–93 (6th Cir. 2002).

149. *See, e.g.*, *Gateway Coal Co. v. United Mine Workers of Am.*, 414 U.S. 368, 386–87 (1974) (construing Section 502 of the Labor Management Relations Act, 29 U.S.C. § 143, referring at one point to what could be deemed an abnormal-danger-in-fact test, explaining the need for “objective evidence that [abnormally dangerous] conditions actually obtain,” but then going on to state that the “ascertainable, objective evidence” must simply support the union’s good faith “conclusion that an abnormally dangerous condition for work exists”).

150. This is in contrast to the federal law sources on refusing unsafe work, all of which predate, by decades, the COVID-19 pandemic.

Rather, states re-opening their economies, after months of sheltering at home in early 2020, have focused on possible justifications for a returning *non-essential* worker's refusal to work, in particular, whether that worker is disqualified from unemployment benefits for rejecting "suitable" employment when offered. Some states have issued guidance explaining that especially vulnerable workers (e.g., those over 65-years-old, immune-compromised, or with certain chronic health conditions) have good cause to refuse work and employers should seek alternative work options such as telework or modified schedules.<sup>151</sup> States also have specified that even non-high-risk workers may refuse to return without losing unemployment benefits if their workplace has "COVID-19-related demonstrable, unsafe working conditions."<sup>152</sup> Other states have chosen a different emphasis, encouraging employers to report workers who decline to return so their unemployment benefits are stopped as soon as possible.<sup>153</sup>

One state with a prior statute addressing the right to refuse unsafe work is New Jersey. New Jersey's Conscientious Employee Protection Act (CEPA) confers a right to "refuse[] to participate in any activity, policy or practice which the employee reasonably believes . . . is incompatible with a clear mandate of public policy concerning the public health[] [or] safety."<sup>154</sup> The New Jersey Supreme Court has broadly interpreted CEPA's public policy mandate in a number of its decisions.<sup>155</sup> The presence of CEPA, combined with New Jersey's detailed guidance regarding protection from COVID-19 health hazards for essential workers as well as others,<sup>156</sup> indicates that an FE

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151. See, e.g., *FAQs on Essential and Non-essential Workers*, CAL. DEP'T INDUS. RELS. (Apr. 10, 2020), <https://www.dir.ca.gov/dlse/Essential-and-Non-essential-Workers.htm> [<https://perma.cc/FT8B-9DPG>] (not applicable to individuals who work in essential services).

152. Colo. Exec. Order No. D 2020 044, pt. II.K, at 5 (Apr. 26, 2020).

153. See Press Release, Ala. Dep't of Lab., *Refusal of Work Can Cause a Disqualification in Unemployment Compensation Benefits* (Apr. 23, 2020), [https://labor.alabama.gov/news\\_feed/News\\_Page.aspx?id=226](https://labor.alabama.gov/news_feed/News_Page.aspx?id=226) [<https://perma.cc/FE8J-BK9Z>].

154. N.J. STAT. ANN. § 34:19-3(c)(3) (West 2006); see also Carolyn Dellatore, *Blowing the Whistle on CEPA: Why New Jersey's Conscientious Employee Protection Act Has Gone Too Far*, 32 SETON HALL LEGIS. J. 375, 383–84 (2008) (discussing CEPA enactment in 1986 intended to codify New Jersey's broad public policy exception to employment at will).

155. See, e.g., *Hernandez v. Montville Township Bd. of Educ.*, 843 A.2d 1091 (N.J. 2004), *aff'g* 808 A.2d 128, 132–33 (N.J. App. Div. 2002) (protecting an experienced and safety-trained school custodian based on his reasonable belief that unsanitary bathroom conditions and burned-out exit sign were violations of health and safety rules); *Mehlman v. Mobil Oil Corp.*, 707 A.2d 1000, 1015 (N.J. 1998) (protecting an employee when he relied on guidelines that gasoline with more than 5% benzene levels was hazardous to human health). See generally Dellatore, *supra* note 154, at 387–99 (discussing these and other New Jersey Supreme Court decisions).

156. See, e.g., *Prohibited COVID-19 Related Employment Discrimination*, 52 NJR 4(2) (2020); *COVID-19 Related Discrimination*, N.J. DEP'T LAB. & WORKFORCE DEV.,

worker's right to refuse unsafe work related to coronavirus risks may have serious traction in that state.

The New Jersey example is exceptional, inasmuch as CEPA may well be the most expansive state law in the country protecting employees from termination for refusal to violate a clear mandate of public policy.<sup>157</sup> Workers in other states bringing causes of action linked to violations of safety and health laws or regulations face tougher obstacles. In the end, both state and federal claims asserting protection for refusal to engage in unsafe work require case-by-case analysis of employer-specific factual circumstances and applicable legal standards on behalf of one or more FE workers.

#### F. The Role of Unions in Bargained-for and Legislated Protections

Unionized employees constitute a small proportion of the U.S. workforce, but they have been able to secure protections in many areas that exceed what federal or state law have provided.<sup>158</sup> To cite a handful of examples, unionized grocery store employees at several national supermarket chains have successfully bargained for temporary hazard pay, 14 days paid sick leave for COVID-19 cases, permission to wear masks and gloves, and measures to protect employees from customers (such as barriers at checkout, limits on the number of customers in the store at once, and signage encouraging social distancing).<sup>159</sup> Unionized postal workers negotiated for additional paid sick leave, including for dependent care, and an expansion of

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[https://www.nj.gov/labor/worker-protections/covid\\_discrimination.shtml](https://www.nj.gov/labor/worker-protections/covid_discrimination.shtml)  
[<https://perma.cc/MV44-DMAF>] (last visited Sept. 29, 2020).

157. See Dellatore, *supra* note 154, at 377. Public safety officers recently filed a complaint alleging a CEPA violation based on termination for objecting to transporting potentially COVID-19-infected students when plaintiffs had no instruction, training, or guidance on how to do so. See Complaint and Jury Demand at 6, *Coley v. Princeton Univ.*, No. MER-L-001108-20 (N.J. Super. Ct. June 19, 2020). Other states have acted by Executive Order in recent months. See, e.g., Minn. Emergency Exec. Order No. 20-54, ¶ 3 (May 13, 2020) (explaining the right to refuse work that employees reasonably believe requires work in unsafe or unhealthful manner regarding exposure to COVID-19 or other infectious agent).

158. See *supra* notes 38–39 and accompanying text.

159. See, e.g., Kroger, *UFCW Announce Increased Pay, Benefits for Grocery Workers on Front Lines of Coronavirus Outbreak*, UFCW (Mar. 31, 2020), <http://www.ufcw.org/2020/03/31/krogercoronavirus/> [<https://perma.cc/XE37-BUR4>] (discussing UFCW agreement covering 460,000 Kroger workers across the country). For a similar agreement with Safeway workers at San Francisco Bay Area stores, see *Local 5 Reaches Agreement with Safeway to Add Protections for Workers During Pandemic Crisis*, UFCW, <https://ufcw5.org/2020/03/local-5-reaches-agreement-with-safeway-to-add-protections-for-workers-pandemic-crisis/> [<https://perma.cc/MG3H-XGYZ>] (last visited Sept. 5, 2020).

teleworking policies.<sup>160</sup> Unionized meatpacking employees negotiated hazard pay for workers at one major employer<sup>161</sup> and temperature checks and a series of PPE protections for employees at other major company plants.<sup>162</sup> Unionized workers at AT&T bargained for a 20% bonus for all time worked during the pandemic.<sup>163</sup> And bus drivers in several cities negotiated increased protections, including a requirement that passengers use rear doors as their entrance.<sup>164</sup>

In addition to securing safety and health protections with respect to individual employers through collective bargaining, unions representing workers in the airline industry lobbied successfully for major industry-wide payroll and employment protections as part of the CARES Act.<sup>165</sup> Through a dedicated subtitle of the Act, the federal government provided \$32 billion

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160. For a discussion of APWU agreements, see Eric Katz, *USPS Tests New Ways to Protect Employees from Coronavirus*, GOV'T EXEC. (May 19, 2020), <https://www.govexec.com/workforce/2020/05/usps-tests-new-ways-protect-employees-coronavirus/165514/> [<https://perma.cc/BC7P-MUL2>].

161. For a discussion of UFCW agreement covering 7,000 Cargill workers at plants located in three states, see *While Some Employers Roll Back "Hero Pay," New UFCW Agreement with Cargill Makes It Permanent*, UFCW (June 17, 2020), <http://www.ufcw.org/2020/06/17/cargillagreement/> [<https://perma.cc/U7GJ-X7H7>].

162. For a discussion of UFCW agreements covering meatpacking plants in Wisconsin, see Press Release, Urb. Milwaukee, UFCW Local 1473 Announces Universal Free Coronavirus Testing for Patrick Cudahy Workers (Apr. 24, 2020), <https://urbanmilwaukee.com/pressrelease/ufcw-local-1473-announces-universal-free-coronavirus-testing-for-patrick-cudahy-workers/> [<https://perma.cc/NBE9-R98N>].

163. See CWA District 9 (@D9action), FACEBOOK (Mar. 24, 2020), <https://www.facebook.com/D9action/posts/3343562335657879> [<https://perma.cc/S27E-BF2Y>].

164. See, e.g., Slaughter, *supra* note 84 (discussing union-backed job action by Detroit bus drivers); see also *BJCTA Responds to Max Bus Drivers on Strike in Birmingham Due to COVID-19 Concerns*, WVTM13 (Mar. 23, 2020, 5:02 PM), <https://www.wvtm13.com/article/some-max-drivers-go-on-strike-over-covid-19-concerns/31895933#> [<https://perma.cc/3B5Q-UFAS>] (discussing the Birmingham, Alabama, response to job action by non-union bus drivers).

165. For a discussion of the support provided by the Air Line Pilots Association (ALPA), see Michele Haydel Gehrke et al., *CARES Act Enacted Just in Time to Give the Airline Industry Much Needed Lift*, REED SMITH (Mar. 28, 2020), <https://www.employmentlawwatch.com/2020/03/articles/employment-us/cares-act-enacted-just-in-time-to-give-the-airline-industry-much-needed-lift/> [<https://perma.cc/Z43F-Y9N5>]. For support from the Association of Flight Attendants (AFA), see *Flight Attendants Win Relief for Workers, Not Corporations*, ASS'N FLIGHT ATTENDANTS-CWA (Mar. 25, 2020), [https://www.afacwa.org/flight\\_attendants\\_win\\_relief\\_for\\_workers\\_not\\_corporations](https://www.afacwa.org/flight_attendants_win_relief_for_workers_not_corporations) [<https://perma.cc/J8AF-69A8>]. For support from the Machinists Union, see *Machinists Union Wins Critical Provisions for Working People in Coronavirus Relief Bill*, INT'L ASS'N MACHINISTS & AEROSPACE WORKERS (Mar. 26, 2020), <https://www.goiam.org/news/machinists-union-wins-critical-provisions-for-working-people-in-coronavirus-relief-bill-2/> [<https://perma.cc/9FCH-NE3J>].

in financial assistance to the airline industry.<sup>166</sup> In order to receive federal funding, airline carriers could not furlough workers or make pay cuts until September 30, 2020, and they are prohibited from repurchasing stock, paying dividends, or making any other capital redistributions until September 30, 2021.<sup>167</sup> Besides preserving compensation for airline workers while restricting diversion of corporate assets to management or shareholders, other provisions place strict limits on compensation increases, termination pay, and severance benefits for highly compensated executives and contractors.<sup>168</sup> Legislative proponents were explicit in recognizing how the funding provisions assured strong industry-wide protections for workers as a condition to rescuing large corporations.<sup>169</sup>

The enacted industry-wide approach preserved the employment status of up to two million airline employees. In this respect, it differs dramatically from the basic U.S. pandemic-response model, which has relegated tens of millions of employees to unemployment status. They scramble to collect benefits on a state-by-state basis from overburdened unemployment insurance (UI) systems while no longer guaranteed the same jobs when conditions improve.<sup>170</sup>

Intriguingly, many European Union countries have adopted employment-preservation approaches similar to Congress's airline industry solution in order to weather the pandemic's economic fallout.<sup>171</sup> State funding in those countries has kept a substantial proportion of wages flowing to workers even when their activity is reduced or ceases; this has allowed employers to retain and eventually welcome back an experienced workforce while contributing to a shared sense of solidarity during the crisis.<sup>172</sup> And

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166. See Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136, Title IV, subtitle B, § 4120, 134 Stat. 281 (codified as amended at 15 U.S.C. § 9080).

167. See *id.* § 4114(a)(1)–(4).

168. See *id.* § 4114(a)(1), (3).

169. See, e.g., 166 CONG. REC. S2026 (daily ed. Mar. 25, 2020) (statement of Sen. Schumer); *id.* at S1926 (statement of Sen. Brown); *id.* at S2025 (statement of Sen. Cantwell).

170. See Peter S. Goodman et al., *European Workers Draw Paychecks. American Workers Scrounge for Food.*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/2020/07/03/business/economy/europe-us-jobless-coronavirus.html> [https://perma.cc/5EA3-E452].

171. See *id.* (discussing how government wage subsidy programs keep furloughed workers employed in France, Germany, Netherlands, Ireland, Britain, and Spain).

172. See *id.*; see also TORSTEN MÜLLER & THORSTEN SCHULTEN, EUR. TRADE UNION INST., ENSURING FAIR SHORT-TIME WORK — A EUROPEAN OVERVIEW 1 (2020), <https://www.etui.org/sites/default/files/2020-06/Covid-19%2BShort-time%2Bwork%2BM%C3%BCller%2BSchulten%2BPolicy%2BBrief%2B2020.07%281%29.pdf> [https://perma.cc/RQ8Q-RU93]; Carolyn Look, *Explaining Kurzarbeit, or Saving Jobs the German Way*, WASH. POST (Apr. 10, 2020, 4:50 AM), <https://www.washingtonpost.com/business/explaining-kurzarbeit-or-saving-jobs-the-german>

while there were some challenges in the implementation of CARES Act airline worker protections,<sup>173</sup> pushback from unions and legislators had a corrective influence.<sup>174</sup>

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The airlines' industry-wide initiative for protecting workers' basic income and job rights should serve as a template for a parallel legislative approach in the area of safety and health. Similarly, the importance of collective pressure in securing even limited safety and health protections for FE workers suggests that legislative change should enhance the role of that collective pressure going forward. FE workers face major ongoing risks as they are asked, or required, to serve and protect the country as a whole. The occasional employer-specific successes described in this Part, set against a general backdrop of federal inactivity or abdication, indicate that a different approach is needed.

### III. PROPOSED LEGAL REFORMS

COVID-19 is likely to be a public health and economic crisis well into the future, and other widespread airborne infectious diseases may follow.<sup>175</sup>

-way/2020/04/07/8376f762-78e7-11ea-a311-adb1344719a9\_story.html  
[https://perma.cc/73JD-NKP7].

173. A few airlines cut hours for certain groups of workers, incurring the wrath of unions and lawmakers at various times. See *AFA Letter to Senate Commerce: Involuntary Reduction in Hours Side-Steps Congressional Intent for CARES Act*, ASS'N FLIGHT ATTENDANTS-CWA (May 6, 2020), [https://www.afacwa.org/letter\\_senatecommerce\\_involuntary\\_reduction\\_hours\\_intent\\_cares\\_act](https://www.afacwa.org/letter_senatecommerce_involuntary_reduction_hours_intent_cares_act) [https://perma.cc/TY2M-Q8VJ]. Thirteen Senators wrote a letter to Delta, demanding a reversal of the hours-slashing policy. See Letter from Elizabeth Warren et al., Sen., U.S. Senate, to Ed Bastain, Chief Exec. Officer, Delta Air Lines, Inc. (May 20, 2020), <https://d3n8a8pro7vhmx.cloudfront.net/afacwa/pages/103/attachments/original/1590111402/Warren-Letter-Delta-CARES-Act-Compliance.pdf?1590111402> [https://perma.cc/Y4V6-H8GL].

174. One airline subsequently walked back its previously announced plan for hours reductions in the face of ongoing criticism and a lawsuit filing. For an article on Machinists Union lawsuit to prevent cuts, see Lauren Zumbach, *Union Files Lawsuit to Halt United's Plan to Reduce 15,000 Airport Workers' Hours as Coronavirus Cost Cuts Continue*, CHI. TRIB. (May 6, 2020, 6:40 AM), <https://www.chicagotribune.com/coronavirus/ct-coronavirus-chicago-united-airlines-cuts-worker-hours-20200501-7qxpmb2sqndtjzbzwevszy2kit4-story.html> [https://perma.cc/X7CM-LW2B]. See also Chris Isidore, *New United CEO Says He Doesn't Want to Cut Any Jobs Despite Crisis*, CNN (May 20, 2020, 6:43 PM), <https://www.cnn.com/2020/05/20/business/united-no-job-cuts/index.html> [https://perma.cc/D869-A99T] (discussing airline CEO's more recent statement wishing to avoid all cuts in hours).

175. For an overview of the H1N1 influenza pandemic of 2009, with global deaths estimated at more than 550,000, see *2009 H1N1 Pandemic (H1N1pdm09 virus)*, CTRS. FOR DISEASE CONTROL & PREVENTION (June 11, 2019), <https://www.cdc.gov/flu/pandemic-resources/2009-h1n1-pandemic.html>



One necessary federal response, for which authorizing legislation already exists,<sup>176</sup> is a federal workplace standard, similar to Virginia's, that prescribes a coherent approach to protection at various levels of exposure. Structural components for such a standard should include administrative and engineering controls, PPE protections, provision for recording and reporting infections, training and education for workers and supervisors, and anti-retaliation protections for workers who raise safety and health concerns. Beyond the need for a comprehensive federal COVID-19 regulation, two types of legislative change should be priorities in order to enhance the rights of FE workers in this setting.

### A. An Industry-Wide or Sectoral Approach to Safety and Health Protection

The COVID-19 crisis illustrates how serious risks to employee safety and health arise in occupation-wide or industry-wide terms. Because such challenges are shared across firms in distinct occupational sectors, public policy responses must prominently include a sector-based framework. As other labor law and labor relations scholars have observed, sectoral responses can generate time and cost savings when compared to a firm-specific approach, while also amplifying workers' role in the policymaking process.<sup>177</sup> The savings derive primarily from overarching norms that reduce or remove safety and health compliance costs from firm-specific competition. Amplified worker voice results from a sectoral structure that assures an equal or comparable role for labor, engaging with

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[<https://perma.cc/LM6R-MTSQ>]. For a summary of the 1918 Spanish Flu pandemic, with global deaths estimated at over 50 million including 675,000 in the United States, see *History of 1918 Flu Pandemic*, CTNS. FOR DISEASE CONTROL & PREVENTION (Mar. 21, 2018), <https://www.cdc.gov/flu/pandemic-resources/1918-commemoration/1918-pandemic-history.htm> [<https://perma.cc/B9G5-QAP6>].

176. See 29 U.S.C. § 655(c), discussed *supra* notes 88–89 and accompanying text.

177. See, e.g., SHARON BLOCK & BENJAMIN SACHS, HARV. L. SCH. LAB. & WORKLIFE PROGRAM, WORKER POWER AND VOICE IN THE PANDEMIC RESPONSE 10 (2020), [https://assets.website-files.com/5ddc262b91f2a95f326520bd/5ef2396d689c3880ec008db2\\_Clean%20Slate\\_Worker%20Power%20and%20Voice%20in%20the%20Pandemic%20Response.pdf](https://assets.website-files.com/5ddc262b91f2a95f326520bd/5ef2396d689c3880ec008db2_Clean%20Slate_Worker%20Power%20and%20Voice%20in%20the%20Pandemic%20Response.pdf) [<https://perma.cc/24X3-MA5L>]; Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 81–89 (2016); Nelson Lichtenstein, *It's Workers Who Should Determine When Their Workplace Is Safe*, AM. PROSPECT (Apr. 29, 2020), <https://prospect.org/labor/its-workers-who-should-determine-when-their-workplace-is-safe/> [<https://perma.cc/97X8-HJHM>]; see also Janice Fine & Jennifer Gordon, *Strengthening Labor Standards Enforcement Through Partnerships with Workers' Organizations*, 38 POL. & SOC'Y 552, 559–60 (2010) (proposing to tailor enforcement strategies to particular industries and to give unions and worker centers an ongoing role in the regulatory process). See generally Nelson Lichtenstein, *Sectoral Bargaining: Historical Roots of a 21st Century Renewal*, in THE CAMBRIDGE HANDBOOK ON LABOR AND DEMOCRACY (Angela B. Cornell & Mark Barenberg eds., Cambridge Univ. Press) (forthcoming 2021).

management and government to reach agreement on the content, and enforcement of those norms.<sup>178</sup>

*i. Sectoral Approach Applicability for Safety and Health*

While appeals to firm efficiency and worker voice are hardly unique to the COVID-19 setting, safety and health as a workplace condition is distinctly amenable to a sectoral approach. Safety protections provided to benefit workers typically entail affirmative employer obligations — new investment in equipment, devices, and structural alterations, along with added human resources to install, operate, and monitor the new investments. As with improvement or protection for employee wages, individual employers are reluctant to absorb the cost associated with these new positive obligations on an individual firm basis.<sup>179</sup> The airline industry legislation

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178. Legislating a sectoral approach on industry-specific safety and health norms may lead to additional support for unionization. *See* Andrias, *The New Labor Law*, *supra* note 177 (contending that social bargaining at the sectoral level will empower unions to act more generally on behalf of workers). *But cf.* Cesar F. Rosado Marzan, *Can Wage Boards Revive U.S. Labor? Marshalling Evidence from Puerto Rico*, 95 CHI.-KENT L. REV. 127, 131, 133–34 (2020) (contending that the relationship between sectoral bargaining and union membership is uncertain).

179. For present purposes, the positive obligations associated with safety and health enhancements or higher wages may be contrasted with certain negative obligations imposed on employers — such as refraining from discrimination based on race or sex. Employers may find it easier to comply with negative obligations, as compliance does not give rise to distinctly new types of investment and may also contribute to greater overall efficiencies by eliminating classifications that are on their face irrelevant to job performance. *See generally* James J. Heckman & J. Hoult Verkerke, *Racial Disparity and Employment Discrimination Law: An Economic Perspective*, 8 YALE L. & POL'Y REV. 276, 290, 297–98 (1990) (discussing how Title VII expanded the pool of available workers for southern textile plants and helped keep the industry initially competitive in the face of foreign competition). At an international level, there is evidence that garment factories in several Southeast Asian countries have achieved high compliance with norms of refraining from child labor and forced labor, and high or moderate compliance with norms of refraining from sex and race discrimination; their greatest area of non-compliance is occupational safety and health. *See* INT'L LABOUR ORG. & INT'L FIN. CORP., BETTERWORK: ANNUAL REPORT 2018 AN INDUSTRY AND COMPLIANCE REVIEW 5–6 (2018), <https://betterwork.org/wp-content/uploads/2018/12/BFC-Annual-Report-2018.pdf> [<https://perma.cc/JTU4-V2PM>]; INT'L LABOUR ORG. & INT'L FIN. CORP., BETTERWORK: ANNUAL REPORT 2018 AN INDUSTRY AND COMPLIANCE REVIEW INDONESIA 7–8 (2018), <https://betterwork.org/wp-content/uploads/2018/12/E-FORMAT-BWI-Annual-Report-2018-english.pdf> [<https://perma.cc/UH95-9EK3>]; INT'L LABOUR ORG. & INT'L FIN. CORP., BETTERWORK: ANNUAL REPORT 2019 AN INDUSTRY AND COMPLIANCE REVIEW VIETNAM 4–7 (2019), [https://betterwork.org/wp-content/uploads/2019/06/BWV\\_Annual-Report-2019\\_EN\\_v4.pdf](https://betterwork.org/wp-content/uploads/2019/06/BWV_Annual-Report-2019_EN_v4.pdf) [<https://perma.cc/PH3C-PGAH>]. The Better Work Program, launched in 2007, is jointly operated by the International Labour Office and the International Finance Corporation; established programs exist in Cambodia, Indonesia, Vietnam, and five other countries. *See Better Work*, INT'L LABOUR ORG., <https://www.ilo.org/washington/areas/better-work/lang-en/index.htm> [<https://perma.cc/PMF4-DMW9>] (last visited Oct. 8, 2020).

discussed in Section II.F suggests that a sectoral approach on wages is workable. Even more than wage increases, firm obligations regarding safety and health tend to arise on a less predictable basis. Relatedly, these obligations are harder to plan and account for in straightforward monetary terms.

In addition, government monitoring and enforcement for safety and health obligations are more challenging and time-consuming than for wage-related obligations. There are over eight million worksites in the United States; at OSHA's annual rate of roughly 32,000 inspections, it would take the agency 250 years to inspect every workplace.<sup>180</sup> Given that government bureaucracies lack the personnel to monitor this vast number of workplaces, baseline safety and health norms can be successfully generated and implemented only with suitable participation from affected employee and employer participants. And sectoral commissions or committees offer a mechanism that can be tailored to the nature and scope of the problems presented.

### *ii. Historical and Contemporary Models*

There is some history in our country of turning to tripartite industrial or occupational committees when seeking to improve wage levels. Professor Kate Andrias has examined the role of industry committees in the early years of the Fair Labor Standards Act (FLSA).<sup>181</sup> Comprised of an equal number of representatives of employers and employees in an industry, as well as members of the public, these committees successfully raised wages for millions of workers between 1938 and 1944.<sup>182</sup> The DOL Administrator issued wage orders based on industry committee recommendations. The committees — appointed for 70 different industries — met and conducted

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180. For number of workplaces and federal inspectors and inspections, see *Commonly Used Statistics*, OCCUPATIONAL SAFETY & HEALTH ADMIN., U.S. DEP'T LABOR, <https://www.osha.gov/data/commonstats> [<https://perma.cc/H7UC-2TPT>] (last visited Sept. 5, 2020). Twenty-four states administer their own OSH programs wholly or in part rather than depending entirely on federal OSHA. See *State Plans*, OCCUPATIONAL SAFETY & HEALTH ADMIN., U.S. DEP'T LABOR, <https://www.osha.gov/stateplans> [<https://perma.cc/JGV6-ZDSJ>] (last visited Sept. 5, 2020). Assuming a comparable number of annual state inspections to the federal level, there is no possibility of covering more than a miniscule proportion of workplaces on an annual basis.

181. See Kate Andrias, *An American Approach to Social Democracy: The Forgotten Promise of the Fair Labor Standards Act*, 128 YALE L.J. 616 (2019) [hereinafter Andrias, *An American Approach*].

182. See *id.* at 678 (discussing coverage of 21 million workers under 70 distinct increases implemented between 1938 and 1944). Under the FLSA, the minimum hourly wage rate was to be increased from its 1938 level of 25 cents to 40 cents (a 60% increase) as rapidly as possible in industries where it was economically feasible. See Dorothy Tuney, *Ten Years Operations Under Fair Labor Standards Act*, 67 MONTHLY LAB. REV. 271, 272 (1948).

factfinding inquiries, gathering economic data that reflected an awareness of geographic wage variations as well as the impact of foreign competition.<sup>183</sup> Recommendations to the Administrator resulted from compromises between business and labor, with public members acting as referees; Andrias describes the process as “a mix between collective bargaining and administrative decision-making.”<sup>184</sup> All 70 committee recommendations supported raising the applicable wage rate; in 83% of the cases, a majority of employer members concurred in these recommendations.<sup>185</sup>

The FLSA industry committees were focused on the review and implementation of wage rates. This has also been true for tripartite commissions at the state level; a recent high-profile example involved New York’s fast-food wage board,<sup>186</sup> and the commissions continue to operate in several states.<sup>187</sup> But such commissions could be structured to address safety and health protections: either by agreeing on approaches to monitor and enforce existing emergency or permanent regulations on an industry-specific basis, or by recommending for approval by a relevant government administrator an additional set of industry-tailored protections. California’s Industrial Welfare Commission (IWC) provides a possible model for this approach.<sup>188</sup>

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183. See Andrias, *An American Approach*, *supra* note 181, at 672–73.

184. *Id.* at 672.

185. See Tuney, *supra* note 182, at 272. The Administrator approved 64 of the 70 industry committee recommendations. See *id.* The last wage order was implemented more than a year before October 1945, when the 40-cent minimum wage was slated to take effect under the FLSA. See Andrias, *An American Approach*, *supra* note 181, at 678.

186. At the direction of Governor Andrew Cuomo, the Acting State Labor Commissioner impaneled the New York fast food wage board. See *Fast Food Wage Board*, N.Y. ST. DEP’T LABOR, <https://labor.ny.gov/workerprotection/laborstandards/wageboard2015.shtm> [<https://perma.cc/YTC6-VRYE>] (last visited Sept. 5, 2020). The board’s hearings and deliberations led to a substantially increased minimum wage for fast food workers. See Mackenzie Baris, *Victory! NY Fast Food Wage Board Recommends \$15 Minimum Wage, JOBS WITH JUST.* (July 22, 2015), <https://www.jwj.org/victory-ny-fast-food-wage-board-recommends-15-minimum-wage> [<https://perma.cc/3AYK-3VTZ>].

187. See, e.g., COLO. REV. STAT. § 8-6-109(2) (2016); N.J. STAT. ANN. § 34:11-56a4.7 (West 2005); see also AZ. REV. STAT. ANN. § 23-314 (2020) (wages of minors). New York’s wage board has not operated since 2016, but existing wage orders remain in effect. See Andrias, *The New Labor Law*, *supra* note 177, at 84 n.443.

188. California is unusual if not unique in having included authorization to address labor conditions such as safety and health, not simply wages. See *About IWC*, ST. CAL. DEP’T INDUS. RELS., <https://www.dir.ca.gov/iwc/aboutIwc.html> [<https://perma.cc/MBA6-M8EP>] (last visited Oct. 15, 2020).

The IWC was established in 1913 as part of a broader set of progressivist labor laws.<sup>189</sup> Notwithstanding a primary wage focus, the IWC is authorized to address safety and health conditions through its industry-specific wage orders.<sup>190</sup> From its earliest days, IWC wage orders included regulation of workplace safety and health conditions, pursuant to recommendations provided by the state Board of Health.<sup>191</sup> Currently, there are 17 operative IWC wage orders, covering specific industries and occupations that include manufacturing, personal services, canning, freezing and preserving, public housekeeping, transportation, amusement and recreation, broadcasting, motion picture, and agricultural.<sup>192</sup> These wage orders typically regulate working conditions such as maintenance of uniforms, tools, and equipment; meal periods and rest periods; change rooms and resting facilities; provision of adequate seating; and suitable temperature controls.<sup>193</sup> It is reasonable to assume that such wage orders could extend to broader occupational and health regulation, if necessary in collaboration with the state OSH Standards Board.

The IWC is tripartite, with two representatives from unions, two from employers, and one from the public, all appointed by the governor with advice and consent of the state senate.<sup>194</sup> If the Commission finds, after

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189. See WELFARE COMMISSION OF THE STATE OF CALIFORNIA, THIRD BIENNIAL REPORT OF THE INDUSTRIAL WELFARE COMMISSION OF THE STATE OF CALIFORNIA: 1917–1918, at 293 (1919) [hereinafter EARLY IWC REPORTS].

190.

It is the continuing duty of the Industrial Welfare Commission . . . to ascertain the wages paid to all employees in this state, to ascertain the hours *and conditions of labor* and employment in the various occupations, trades, and industries in which employees are employed in this state, and *to investigate the health, safety, and welfare of those employees.*

CAL. LAB. CODE § 1173 (West 1998) (emphasis added). Section 1173 further provides that the IWC must defer to the OSH Standards Board in cases where regulations or policies of the two state entities overlap.

191. See, e.g., EARLY IWC REPORTS, *supra* note 189, at 269–70 (recommendations of Board of Health to IWC for the fruit and vegetable canning industry on lighting, ventilation, toilets, drinking water, and seats); *id.* at 273–75 (IWC working condition orders on those same subjects).

192. See 8 CAL. CODE REGS. tit. 8, §§ 11000–11170 (1998).

193. See *id.*

194. See CAL. LAB. CODE § 70 (West 2020). In 2006, the IWC was not refunded following a period of disagreement between the California legislature, which wanted to increase the minimum wage, and the IWC, which did not. See Marjorie Fochtman, *From the Experts: Will the Revival of California's Industrial Welfare Commission Reduce the Explosion of Wage and Hour Litigation for California Employers?*, HR DAILY ADVISOR (Mar. 1, 2007), <https://hrdailyadvisor.blr.com/2007/03/01/from-the-experts-will-the-revival-of-california-s-industrial-welfare-commission-reduce-the-explosion-of-wage-and-hour-litigation-for-california-employers/> [https://perma.cc/KZK9-XQRZ]. See generally STEVEN EGGLESTON, LABOR

investigation including at least one public hearing, “that hours or conditions of labor may be prejudicial to the health or welfare of employees in any occupation, trade, or industry,” it is required to convene an industry-specific tripartite wage board.<sup>195</sup> That wage board considers the IWC factual findings, as well as any other information it deems appropriate, and submits recommendations to the Commission;<sup>196</sup> the IWC then is authorized to prepare its own proposed regulation that must, in turn, include “any recommendation of the wage board which received the support of at least two-thirds of the [board] members.”<sup>197</sup> Following public hearings on the proposed regulation, the IWC may issue wage orders with the force of law.<sup>198</sup> The state bureaucracy enforces existing wage orders; there is also provision for private enforcement by individual employees.<sup>199</sup>

The California IWC may well be the most relevant current prototype for a sectoral approach promulgating and enforcing workplace safety and health protections. While other historical and current examples exist, they raise different types of challenges that can only be summarized here. In historical terms, the National Industrial Recovery Act (NIRA) codes of fair competition, operating from 1933–1935, were promulgated on industry-wide bases.<sup>200</sup> Although the worker-related focus was on wages and hours, some codes required an employer to “make reasonable provision for the safety and health of his employees at the place and during the hours of their

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AND EMPLOYMENT IN CALIFORNIA: A GUIDE TO EMPLOYMENT LAWS, REGULATIONS, AND PRACTICES ch. 2 § 2-2 (Matthew Bender ed., 2d ed. 2019) (describing continued applicability of the 17 operative wage orders). The authorizing legislation remains in place — and the Department of Industrial Relations has amended and republished wage orders in effect at that time in accordance with the state’s ongoing minimum wage increase schedule — although working condition changes are not included in the ongoing adjustments. *See* CAL. LAB. CODE § 1182.13 (West 2007). Application of the existing wage orders, including for non-wage conditions in effect as of 2006, remains the subject of litigation. *See, e.g.,* *Lazarin v. Superior Court*, 188 Cal. App. 4th 1560, 1575–78 (Cal. Ct. App. 2010) (invalidating an exemption from a specific wage order that had relieved employers from obligation to provide a second meal break).

195. CAL. LAB. CODE § 1178.5(b) (West 1980). *See generally id.* § 1178.

196. *See id.*

197. *Id.* § 1178.5(c).

198. *See id.* §§ 2699(a), (f)(2).

199. Existing wage orders carry civil penalties, to be enforced by the Division of Labor Standards Enforcement (DSLE). The DSLE periodically issues Opinion Letters, which are given deference in interpreting the wage orders. *See Bell v. Farmers Ins. Exch.*, 105 Cal. Rptr.2d 59, 66 (Cal. Ct. App. 2001). Individual employees may file a civil action against an employer to recover penalties of \$100 for the first violation and \$200 for subsequent violations, per employee per pay period. *See* CAL. LAB. CODE §§ 2699(a), (f)(2) (West 2016).

200. *See* ELLIS HAWLEY, *THE NEW DEAL AND THE PROBLEM OF MONOPOLY: A STUDY IN ECONOMIC AMBIVALENCE* 57 (1966).

employment.”<sup>201</sup> Apart from issues of unconstitutional delegation of legislative power to private groups with minimal executive branch control,<sup>202</sup> the codes themselves were not really a tripartite product. They were essentially voluntary business initiatives, drafted with relatively little input from labor interests or experienced government bureaucrats, and lacking a genuine enforcement mechanism.<sup>203</sup>

By contrast, the National War Labor Board (NWLB), created in 1942 and charged with resolving labor-management disputes in order to prevent work stoppages that might impede the war effort, was truly tripartite in structure and operation.<sup>204</sup> In connection with that mission, the federal government carried out dozens of seizures of private enterprises from 1942–1946.<sup>205</sup> The Board’s function, however, was primarily adjudicative — to issue directive orders determining outcomes in these wartime labor disputes.<sup>206</sup> The NWLB

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201. NAT’L RECOVERY ADMIN., CODE OF FAIR COMPETITION FOR THE WHOLESALE COAL INDUSTRY 416 (1934). For other codes with similar safety and health provisions, see, e.g., NAT’L RECOVERY ADMIN., CODE OF FAIR COMPETITION FOR THE LYE INDUSTRY 225 (1934) (“Each employer shall make reasonable provision for the safety and health of his employees at the place and during the hours of their employment, and shall list with the Code Authority all occupations of a dangerous nature.”); NAT’L RECOVERY ADMIN., CODE OF FAIR COMPETITION FOR THE ZINC INDUSTRY 45 (1935) (“Every employer shall provide for the safety and health of employees during the hours and at the places of their employment. Standards for safety and health shall be submitted by the Code Authority to the Board within three (3) months after the effective date of this Code.”).

202. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537, 541–42 (1935).

203. See, e.g., HAWLEY, *supra* note 200; Rudolph Peritz, *Three Visions of Managed Competition, 1920–1950*, 39 ANTITRUST BULL. 273, 279 (1994); Michael L. Wachter, *Labor Unions: A Corporatist Institution in a Competitive World*, 155 U. PA. L. REV. 581, 599–600 (2007). Labor did play a larger role in aspects of implementation and enforcement. See COLIN GORDON, *NEW DEALS: BUSINESS, LABOR, AND POLITICS IN AMERICA, 1920–1935*, at 194–203 (1994).

204. See Exec. Order No. 9017, 7 Fed. Reg. 237 (Jan. 12, 1942) (establishing the National War Labor Board “for the peaceful adjustment of [labor] disputes”; to be composed of 12 special commissioners appointed by the President; four representative of the public; four representative of employees; and four representative of employers; the Chairman and Vice Chairman to be designated by the President from members representing the public).

205. The War and Navy Departments administered the seizures. While roughly half were interventions to end unauthorized strikes by workers that disrupted war production, a comparable number were triggered by business leaders’ willingness to disobey federal law. See MARK R. WILSON, *DESTRUCTIVE CREATION: AMERICAN BUSINESS AND THE WINNING OF WORLD WAR II 190–91* (2016).

206. See Robert G. Dixon, *Tripartism in the National War Labor Board*, 2 INDUS. & LAB. RELS. REV. 372, 381 (1949); Allan R. Richards, *Tripartism and Regional War Labor Boards*, 14 J. POLITICS 72, 77 (1952). Although the NWLB could not go to court to enforce its “directive orders,” incentive to comply with an order came from the Board’s ability to refer a case to the President, who could seize control over an offending plant or company, as well as from the shared commitment to the war effort. See Dixon, *supra* note 206, at 373–74, 385; Richards, *supra* note 206, at 76. For a vivid example of the presidential seizure authority in action (including an iconic photograph), see Nelson Lichtenstein, *World War II: When the*

also operated largely through 12 regional war labor boards (also tripartite).<sup>207</sup> Such a regional structure is not well-suited to the safety- and health-related challenges arising in modern occupations or industries.

A more contemporaneous context for sectoral application of health and safety protections is multi-employer nationwide collective bargaining. The National Football League Players Association has, for many years, negotiated a collective bargaining agreement (CBA) covering all 30 teams. The current CBA includes 28 pages detailing players' rights to safe working conditions and comprehensive medical care and treatment.<sup>208</sup> Protections include levels of working condition assessment and specialized prevention and treatment that far exceed what one might anticipate for almost any other occupational sector.<sup>209</sup> There are CBAs with an aspiring industry-wide scope that includes less extensive safety and health protections, as befits their less hazardous industries.<sup>210</sup> And examples of CBAs that impact portions of an industry beyond the immediate signatory employer(s) include pattern bargaining in the auto and hotel industries and multi-employer bargaining in the construction industry.<sup>211</sup> Still, the major challenge to a sectoral collective

*Government Protected All Essential Workers*, LAB. NOTES (Apr. 2, 2020), <https://labornotes.org/blogs/2020/04/world-war-ii-when-government-protected-all-essential-workers> [<https://perma.cc/R5QY-ZTFP>] (describing how the head of Montgomery Ward refused to comply with a NWLB order; the union then went on strike and President Roosevelt seized the company. The photograph is of two soldiers carrying the well-dressed CEO of Montgomery Ward out of his headquarters and onto the street). The NWLB also had authority to allow increases in wage and salary rates. See Richards, *supra* note 206, at 76.

207. See Dixon, *supra* note 206, at 381, 389; Richards, *supra* note 206, at 77.

208. See *Collective Bargaining Agreement 2020*, NAT'L FOOTBALL LEAGUE PLAYERS ASS'N 214-42 (Mar. 5, 2020), [https://nflpaweb.blob.core.windows.net/media/Default/NFLPA/CBA2020/NFL-NFLPA\\_CB\\_A\\_March\\_5\\_2020.pdf](https://nflpaweb.blob.core.windows.net/media/Default/NFLPA/CBA2020/NFL-NFLPA_CB_A_March_5_2020.pdf) [<https://perma.cc/NVF3-4BNG>].

209. See *id.* (discussing, inter alia, field surface safety and performance; required credentials and training for various levels of club medical providers; players' right to second medical opinions and to the surgeon of their choice; strict regulation of blood and urine testing; detailed protocols governing diagnosis and treatment of concussions and neck, head, spine injuries; and programs for behavioral health, prescription medication, and pain management).

210. See, e.g., *Master Freight Agreement*, INT'L BROTHERHOOD TEAMSTERS, <https://teamster.org/about/teamster-history/master-freight-agreement/> [<https://perma.cc/C8U8-SYDA>] (last visited Sept. 5, 2020); *Writers Guild of America, 2017 Theatrical and Television Basic Agreement*, ALL. MOTION PICTURE & TELEVISION PRODUCERS, INC. ET AL. (2017), [https://www.wgaeast.org/wp-content/uploads/sites/4/2018/10/2017\\_WGA\\_MBA-FINAL.pdf](https://www.wgaeast.org/wp-content/uploads/sites/4/2018/10/2017_WGA_MBA-FINAL.pdf) [<https://perma.cc/B6MU-38XY>].

211. In pattern bargaining, a union reaches agreement on a set of terms and conditions with one employer that then becomes the pattern for subsequent agreements with other employers in the same industry. See generally Lynn Rhinehart & Celine McNicholas, *Collective Bargaining Beyond the Worksite*, ECON. POL'Y INST. (May 4, 2020), <https://www.epi.org/publication/collective-bargaining-beyond-the-worksite-how-workers-an>



bargaining approach is that with a few exceptions like professional team sports, CBAs do not come close to industry-wide coverage. Moreover, industry-wide pattern bargaining is considerably more limited today than it was a few decades back.<sup>212</sup> This shrinkage is due to a number of factors, including that U.S. labor law as enacted and applied over many decades has presented serious obstacles to unionization.<sup>213</sup>

### *iii. Legal and Practical Questions*

Sectoral approaches comparable to California's IWC are attractive, but they also present challenges. This Subsection briefly discusses three issues, although more in-depth analysis is appropriate. One legal issue is whether the tripartite structure and operation will overcome concerns raised under the nondelegation doctrine. A federal tripartite commission, appointed by the President with advice and consent of the Senate, seems legitimate, assuming there is statutory clarity regarding tenure and conditions for removal.<sup>214</sup> A structure parallel to the IWC would have the Commission retain authority to promulgate a sector-specific regulation after receiving recommendations from a sectoral board. An IWC-type standard of delegated authority to promulgate this regulation — whether current “conditions of labor may be prejudicial to the health or welfare of employees in any occupation, trade, or industry”<sup>215</sup> — would be tested in light of the Supreme Court's apparent interest in further exploring its “intelligible principle” jurisprudence.<sup>216</sup> Although current Court precedent seems consistent with an IWC-type

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d-their-unions-build-power-and-set-standards-for-their-industries/  
[<https://perma.cc/BG86-RGR9>].

212. See, e.g., JONATHAN D. ROSENBLUM, *COPPER CRUCIBLE: HOW THE ARIZONA MINERS' STRIKE OF 1983 RECAST LABOR-MANAGEMENT RELATIONS IN AMERICA* 105–07, 218–19 (1998) (describing the breakdown of pattern bargaining in the copper industry); Audrey Freeman & William E. Fulmer, *Last Rites for Pattern Bargaining*, HARV. BUS. REV. 30, 40 (1982) (describing the breakdown of pattern bargaining in the auto and rubber industries); Harry C. Katz, *The Decentralization of Collective Bargaining: A Literature Review and Comparative Analysis*, 47 INDUS. & LAB. RELS. REV. 3, 11 (1993) (reporting abandonment of pattern bargaining in the steel industry).

213. See, e.g., JULIUS G. GETMAN, *THE SUPREME COURT ON UNIONS: WHY LABOR LAW IS FAILING AMERICAN WORKERS* (2016); Andrias, *The New Labor Law*, *supra* note 177, at 25–32; James J. Brudney, *Reflections on Group Action and the Law of the Workplace*, 74 TEX. L. REV. 1563 (1996); Cynthia Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527 (2002).

214. See generally *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020).

215. CAL. LAB. CODE § 1178.5(b) (West 1980).

216. *Compare Gundy v. United States*, 139 S. Ct. 2116, 2129–30 (2019) (plurality opinion), *with id.* at 2139–41 (Gorsuch J., dissenting).

standard,<sup>217</sup> adding more definiteness or detail could address any ongoing delegation concerns.

A second legal issue is how a tripartite commission and its industry-specific boards would interface with NLRA regulation of the private-sector workforce. If the entire structure is federal, there is no issue of preemption. Sector-specific commission decisions, like FLSA wage and hour determinations, can co-exist with labor-management regulation, and presumably would supplement or complement any applicable CBA protections. However, state commissions and sectoral wage boards may also be part of a legislative approach, especially given that transit workers, public school teachers, and other FE workers at state and local agencies are not uniformly protected under the federal occupational safety and health statute.<sup>218</sup> If state law authorizes state-level commissions to address private-sector industries as well as public employment, there may be challenges brought under NLRA preemption doctrine. Supreme Court caselaw could be seen as supportive of such challenges, based on the theory that tripartite commission-imposed safety and health protections are a form of state-approved bargaining, interfering with what the NLRA expects should be left to “the free play of economic forces” between labor and management.<sup>219</sup>

That said, prospects for success of a *Machinists* preemption challenge are doubtful.<sup>220</sup> The existence of a tripartite negotiation process through a state commission does not mean the state is pressing its regulatory thumb on the scale of individually bargained agreements. Rather, the result of any tripartite effort would be a regulation of broad sectoral applicability. And the Court has declined to limit the authority of states or local governments to enact generally applicable employment regulation that extends beyond

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217. See *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472–76 (2001); see also *Opp Cotton Mills, Inc. v. Adm'r of Wage & Hour Div. of Dept. of Lab.*, 312 U.S. 126, 142–46 (1941) (the Supreme Court unanimously upheld FLSA wage-committee structure against charge of unconstitutional delegation of legislative power).

218. See 29 U.S.C. § 652(5) (excluding states and their subdivisions from the definition of “employer”). The federal statute provides that these workers may have OSHA protections if they work in a state that has an OSHA-approved state program. See *id.* § 667. Twenty seven states have OSHA-approved plans covering public-sector workers while 23 states do not. See OCCUPATIONAL SAFETY & HEALTH ADMIN., U.S. DEP'T OF LAB., ALL ABOUT OSHA (2020), [https://www.osha.gov/Publications/all\\_about\\_OSHA.pdf](https://www.osha.gov/Publications/all_about_OSHA.pdf) [<https://perma.cc/ZT6D-8ATH>].

219. See *Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wis. Emp. Rels. Comm'n*, 427 U.S. 132, 147, 149–50 (1976).

220. For a more extended discussion of this issue, reaching the same conclusion, see Andrias, *The New Labor Law*, *supra* note 177, at 90–92. For an in-depth analysis of labor preemption application to tripartite lawmaking by state and local governments, see Benjamin I. Sachs, *Despite Preemption: Making Labor Law in Cities and States*, 124 HARV. L. REV. 1153, 1197–220 (2011).

federal levels of protection.<sup>221</sup> Relatedly, the California Supreme Court in 1980 rejected a *Machinists*-based preemption challenge to the IWC on this ground.<sup>222</sup>

Finally, there is a practical issue of whether the tripartite Commission and its wage boards will function in ways that are unduly partisan or politicized. Past experience of state tripartite commissions authorizing wage increases<sup>223</sup> suggests that governors — directly or through neutral commission members — tend to have outsized influence, as labor and management representatives often disagree.<sup>224</sup> This influence may be an acceptable tradeoff in democratic accountability terms for a commission structure that incorporates substantial labor and management participation on a sectoral basis. At the same time, following Andrias’s earlier description of the FLSA industry committees as a “mix between collective bargaining and administrative decision-making,”<sup>225</sup> a law could be drafted to bend somewhat toward bargaining by providing for a government-appointed arbitrator to resolve evenly divided commission outcomes. And because disagreements over sectoral safety and health protections are likely to be more multidimensional and complex than wage disputes, the legislation could make use of one of three recurring designs from the interest arbitration setting: choosing between the two sides’ final offers on each issue in disagreement, choosing one complete package of proposals over the other, or exercising discretion on each disputed issue.<sup>226</sup>

### B. Protection for Diverse Forms of Safety and Health Protests

Unlike the need for a new legislative approach creating industry-wide commissions on workplace safety and health, an enhanced right to protest hazardous conditions can be achieved through modification of existing labor law provisions. In a seminal law review article, Craig Becker examined how the courts and NLRB have restricted the scope of protected strike activity

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221. See, e.g., *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756–57 (1985); *N.Y. Tel. Co. v. N.Y. State Dep’t of Lab.*, 440 U.S. 519, 532–33 (1979) (plurality opinion).

222. See *Indus. Welfare Comm’n v. Superior Ct.*, 613 P.2d 579, 600–01 (Cal. 1980) (concluding that the *Machinists* preemption doctrine does not interfere with states’ authority to set, inter alia, safety and health standards that exceed what has been bargained for in particular agreements).

223. In addition to California, this experience includes New York, New Jersey, Colorado, and Arizona. See *supra* notes 186–187.

224. See Andrias, *The New Labor Law*, *supra* note 177, at 87; Marzan, *supra* note 178, at 140.

225. Andrias, *An American Approach*, *supra* note 181, at 672.

226. See Barry Winograd, *An Introduction to the History of Interest Arbitration in the United States*, 61 LAB. L.J. 164, 168 (2010).

under the NLRA.<sup>227</sup> By essentially confining protection to settings where strikers entirely abandon their work and remain away from the workplace until either reaching a settlement or conceding defeat,<sup>228</sup> the law fails to credit more limited forms of work stoppage, including slowdowns and work-to-rule, intermittent strikes, and refusals to perform specific tasks.<sup>229</sup> This stark binary conception is at odds with the definitional approach to strikes under the law of many other countries.<sup>230</sup> It also conflicts with the approach adopted under international law, which views such limited work stoppages as presumptively protected — with restrictions justified only if the action ceases to be peaceful.<sup>231</sup>

The withered universe of protected strike activity under the NLRA has special relevance in the safety and health context. More than many conditions of employment, safety and health are quintessentially collective goods. An individual worker's successful assertion of the right to eliminate an unhealthy or unsafe workplace condition has the inherent and predictable effect of benefiting not just that worker but all similarly situated employees.<sup>232</sup> Further, unlike strikes for improved wages or job security

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227. See Craig Becker, "Better Than a Strike": *Protecting New Forms of Collective Work Stoppages Under the National Labor Relations Act*, 61 U. CHI. L. REV. 351 (1994).

228. The concession can take the form of one or more workers crossing the picket line, or a broader recognition that the strike has been broken and the workers collectively return to whatever jobs remain available. See *id.* at 354–55.

229. See *id.* at 368–69 (discussing the 1949 Supreme Court *Briggs Stratton* decision deeming intermittent strikes unprotected, and the 1951 Labor Board *Elk Lumber* decision refusing to protect slowdowns). For an in-depth discussion of the law of intermittent strikes, see Michael M. Oswalt, *Improvisational Unionism*, 104 CALIF. L. REV. 597, 658–69 (2016).

230. See BERND WAAS, *THE RIGHT TO STRIKE: A COMPARATIVE VIEW* 3–5, 52–53 (Bernd Waas ed., 2014) (contrasting the "more rigid" legal approach in the United States with definitions encompassing various forms of limited work stoppages in Czech Republic, South Africa, Turkey, Malaysia, Israel, Italy, Uruguay, and Germany).

231. The international jurisprudence is set forth primarily in the work of two key supervisory bodies of the International Labor Organization (ILO) (established in 1919 and since 1945 a part of the United Nations): the tripartite Committee of Freedom of Association (CFA), established in 1951, and the independent Committee of Experts on the Application of Conventions and Recommendations (CEACR), established in 1926. See *Freedom of Association: Compilation of Decisions of the Committee on Freedom of Association*, INT'L LABOUR OFF. 148 (2018), [https://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---normes/documents/publication/wcms\\_632659.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_632659.pdf) [<https://perma.cc/X9BY-XBTW>]; *Giving Globalization a Human Face*, INT'L LABOUR OFF. 51 (2012), [https://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---relconf/documents/meetingdocument/wcms\\_174846.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_174846.pdf) [<https://perma.cc/5F59-U932>]. See generally JEFFREY VOGT ET AL., *THE RIGHT TO STRIKE IN INTERNATIONAL LAW* (2020) (detailing the central role of the ILO and its supervisory bodies in developing and explaining the international right).

232. The Supreme Court has recognized this reality in the unionized setting. See *NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 832 (1984). The Labor Board has declined to endorse the same position with respect to employees of a non-union company. See *Meyers Indus.*,

protections, which often reflect prolonged perceptions of chronic mistreatment, protests against life- or health-threatening workplace conditions are likely to arise in more acute circumstances and without extensive advance planning. The Supreme Court recognized this difference when providing protection to a spontaneous walkout by non-union employees protesting extreme winter conditions in an aluminum plant with a broken-down furnace.<sup>233</sup> But such protection has been largely confined to one-off events. Even if faced with hazardous conditions over a more extended period, workers who wish to engage in peaceful short-term or intermittent walkouts or slowdowns to protest serious threats to their health and safety are simply not protected strikers.<sup>234</sup>

Labor law's existing protections for employees who refuse to engage in unsafe work have value, but for reasons discussed earlier, their impact has been limited. Constraints include (i) employees' need to rely on the Secretary of Labor to assert their refusal rights under the OSH Act; (ii) restrictions on such refusals under the NLRA, both from no-strike agreements that cover unionized workers and from employers' right to permanently replace "protected" strikers whether unionized or not; and (iii) the uncertain meaning of "abnormally dangerous conditions for work" under Section 502.<sup>235</sup>

In order to provide sufficient protection for FE workers and others engaged in safety and health protests, certain interrelated changes to existing labor law are needed. Two of these changes are addressed in large-scale labor law reform legislation that passed the House earlier this year but is unlikely to be taken up in the Senate.<sup>236</sup> First, the definition of "protected strikes" must be legislatively expanded to cover intermittent or repeated safety-related walkouts or slowdowns, with or without a union presence. The pending labor law reform bill includes specific language that seems able to accomplish this goal by expanding the NLRA section on preserving the right to strike.<sup>237</sup> Second, the permanent replacement of lawful strikers must

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Inc., 281 N.L.R.B. 882, 885–86 (1986), *aff'd sub nom.*, Prill v. NLRB, 835 F.2d 1481 (D.C. Cir. 1987).

233. See NLRB v. Wash. Aluminum Co., 370 U.S. 9, 14–18 (1962).

234. See Becker, *supra* note 227, at 376–85; Oswalt, *supra* note 229, at 658–65. See generally Walmart Stores, Inc., 368 N.L.R.B. No. 24 (July 25, 2019).

235. See *supra* Section II.E; *supra* text accompanying notes 140–149. The NLRA Section 158(g)'s ten days advance notice requirement for concerted activity by unionized employees at healthcare facilities, see *supra* note 145, raises a separate procedural hurdle with respect to urgent safety or health protests in those settings. The advance notice requirement does not apply to non-union concerted activities at healthcare facilities.

236. See *supra* note 19 (discussing House passage and dim prospects for enactment in 116th Congress).

237. See Protecting the Right to Organize Act of 2020 (PRO Act), H.R. 2474, 116th Cong. § 12(j) (2020) (amending 29 U.S.C. § 163 to provide that "the duration, scope, frequency, or

be declared unlawful. That U.S. law allows for such replacements has been the subject of intense and prolonged academic criticism as well as prior legislative reform efforts.<sup>238</sup> The pending reform bill includes a provision prohibiting this practice.<sup>239</sup> Assuming the bill as a whole remains stalled in the Senate, these two changes deserve separate consideration as part of an effort to create meaningful safety and health protections for FE workers.

The third change to existing labor law provisions involves the language of Section 502, which classifies any “good faith” quitting of labor “because of abnormally dangerous conditions” as *not* a strike. This classification is important because it allows workers to protest sufficiently hazardous conditions without being subject to the no-strike provision of a collective bargaining agreement. As discussed earlier, there is uncertainty from previous court and agency decisions as to the contours of this standard.<sup>240</sup> Stronger protection for FE workers could be secured if the language were adjusted to clarify that (a) “good faith” refers to the employees’ subjective belief supported by some objective evidence (rather than requiring evidence that the abnormally dangerous conditions, in fact, are present), and (b) “abnormally dangerous conditions” cover heightened risks to workers’ safety and health such as those evident for FE workers under COVID-19, even if these conditions do not create immediate life-threatening circumstances.

### C. Protection for Immigrant Frontline Essential Workers

Although reform of the immigration laws is too complex and controversial a subject to be taken up here, certain points are worth emphasizing. Migrant workers, including workers who are undocumented, perform a disproportionate amount of the FE work in a number of occupations, such as

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intermittence of any strike or strikes shall not render such strike or strikes unprotected or prohibited”).

238. For discussion of academic criticism as well as a sharp increase in the use of permanent replacements since 1980, see James J. Brudney, *To Strike or Not to Strike*, 1999 WIS. L. REV. 65, 69, 69 n.22, 71–72 (1999) (reviewing JULIUS GETMAN, *THE BETRAYAL OF LOCAL 14: PAPERWORKERS, POLITICS AND PERMANENT REPLACEMENTS* (1998)). For discussion of congressional efforts at reform in 1992 and 1994 that secured majority support in both houses but could not overcome Senate filibusters, see *id.* at 81–82.

239. See H.R. 2474 § 2(d). H.R. 2474 § 2(d) amended 29 U.S.C. § 158(a) to add a new employer unfair labor practice as follows: “(6) to promise, threaten, or take any action — (A) to permanently replace an employee who participates in a strike as defined by section 501(2) of the Labor Management Relations Act, 1947 (29 U.S.C. § 142(2)),” which in turn defines a strike to include “any strike or other concerted stoppage of work by employees . . . and any concerted slowdown or other concerted interruption of operations by employees.” *Id.*; 29 U.S.C. § 142(2).

240. See *supra* notes 148–149 and accompanying text (discussing the Board’s 1999 decision in *TNS Inc.*).

agriculture, meatpacking, building and cleaning services, and home healthcare.<sup>241</sup> Even before COVID-19, U.S. citizens have shunned these occupations as too difficult, dangerous, dirty, or otherwise unattractive.<sup>242</sup> In addition, legal protections provided for FE workers do not adequately extend to occupations in which migrants are concentrated. For instance, agricultural workers are covered under the FFCRA, but the carve-outs for employers with fewer than 50 or more than 500 employees exempt some three-fourths of these workers from paid sick leave protections.<sup>243</sup> Further, migrants working in agriculture, meatpacking, and other industries must endure crowded living conditions and inadequate healthcare services; the added influence of these factors contributes to migrant workers suffering far greater incidents of illness and death as they perform work that is deemed essential for the country.<sup>244</sup>

The COVID-19 pandemic provides an opportunity to assure migrant essential workers have the same safety and health protections as others on the front lines. This should include access to sufficient PPE, hazard pay, and paid sick leave; protection against retaliation (including threats of deportation) when engaged in otherwise lawful safety-based strikes or protest action; and opportunities to participate as workers on industry-wide commissions or boards established in the future.

The proposed HEROES Act offers some of these protections.<sup>245</sup> An additional option involves expanding the current U-Visa program to include immigrant workers exposed to serious workplace safety and health

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241. See *supra* notes 28–31 and accompanying text.

242. See Jens Manuel Krogstad et al., *A Majority of Americans Say Immigrants Mostly Fill Jobs U.S. Citizens Do Not Want*, PEW RSCH. CTR. (June 10, 2020), <https://www.pewresearch.org/fact-tank/2020/06/10/a-majority-of-americans-say-immigrants-mostly-fill-jobs-u-s-citizens-do-not-want/> [<https://perma.cc/4QCR-GP2Y>].

243. See Costa & Martin, *supra* note 64.

244. See, e.g., Patricia Mazzei, *Florida's Coronavirus Spike Is Ravaging Migrant Farmworkers*, N.Y. TIMES (June 23, 2020), <https://www.nytimes.com/2020/06/18/us/florida-coronavirus-immokalee-farmworkers.html?searchResultPosition=1> [<https://perma.cc/PF3H-6GJK>]; Michelle A. Waltenburg et al., *Update: COVID-19 Among Workers in Meat and Poultry Processing Facilities — United States, April–May 2020*, CTRS. FOR DISEASE CONTROL & PREVENTION: MORBIDITY & MORTALITY WKLY. REP. (July 10, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/mm6927e2.htm> [<https://perma.cc/T77B-Z4KH>].

245. See Health and Economic Recovery Omnibus Emergency Solutions Act, H.R. 6800, 116th Cong. (2020). Provisions that would impact agricultural workers, meatpacking workers, and other migrants, include (1) ability to receive a stimulus check with a taxpayer identification number only, (2) shield from deportation of undocumented migrants (until 90 days after the emergency ends), (3) hazard pay for essential workers, (4) requirement that employers with more than 500 employees provide paid sick leave, and (5) expedited green cards for migrant health workers.

violations.<sup>246</sup> Broader U-Visa coverage would allow immigrant workers to report such hazards and violations to labor regulators without the same fear of adverse interaction with immigration enforcement authorities.<sup>247</sup> And ultimately, if migrant FE workers are to receive equal treatment for the recognized valorous nature of their continuing service, their access to a path to citizenship should be part of further discussion on reforming our immigration laws.

### CONCLUSION

The United States is living through its worst public health crisis in more than a century, combined with an economic and employment crisis reminiscent of the Great Depression, and a national awakening to fundamental racial inequalities that rival those confronted in the 1960s. Given such a confluence of events, this Article has focused on the grave weaknesses of our laws meant to safeguard the health and safety of workers in the United States, and especially FE workers.

At the same time, the crises may serve as a moment of opportunity. The country has been sensitized to the heroic role FE workers play; these men and women need and deserve far better workplace protections, for the sake of their health, their families, their communities, and their lives. This Article has examined how particular reforms can reshape our regulatory approach to workplace safety and health protections, and thereby enhance workers' capacity to express legitimate needs and assure rights to meaningful protection. Whether these or similar legislative measures will emerge from the present crises — as occurred in the context of prior national emergencies and moments of opportunity — remains to be seen.

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246. See *supra* notes 134–135 and accompanying text (discussing U-Visa program providing special nonimmigrant status).

247. See Nadas, *supra* note 134, at 155–64 (proposing this reform to the U-Visa program). On the other hand, immigrant workers would hardly be free from such adverse interaction. Under a 2018 Guidance issued by U.S. Citizenship and Immigration Services (USCIS), when a U-visa application is denied, the applicant is referred to Immigrations and Customs Enforcement (ICE) and placed in removal proceedings. See generally U.S. CITIZENSHIP & IMMIGR. SERVS., U.S. DEP'T OF HOMELAND SEC., POLICY MEMORANDUM: PM-602-0050.1 (2018), <https://www.uscis.gov/sites/default/files/document/memos/2018-06-28-PM-602-0050.1-Guidance-for-Referral-of-Cases-and-Issuance-of-NTA.pdf> [<https://perma.cc/BM79-FQ8L>].