

2021

Essential or Disposable?: Healthcare Workers' Right to Refuse Hazardous Work

Christa Coryea

Follow this and additional works at: <https://ir.lawnet.fordham.edu/ulj>

Recommended Citation

Christa Coryea, *Essential or Disposable?: Healthcare Workers' Right to Refuse Hazardous Work*, 48 Fordham Urb. L.J. 1363 (2021).

Available at: <https://ir.lawnet.fordham.edu/ulj/vol48/iss5/11>

This Note is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Urban Law Journal by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

ESSENTIAL OR DISPOSABLE? HEALTHCARE WORKERS' RIGHT TO REFUSE HAZARDOUS WORK

*Christa Coryea**

Introduction	1364
I. Existing Frameworks for Worker Safety	1366
A. Statutory Protections for Those Who Refuse to Perform Dangerous Work	1367
i. Section 502: Abnormally Dangerous Conditions	1368
ii. Section 7: Protected Concerted Activity.....	1370
B. Regulatory Protections for Those Who Refuse to Perform Dangerous Work	1372
C. Healthcare Workers' Rights Under Existing Labor Law	1374
D. Healthcare Workers' Safety During the COVID-19 Pandemic.....	1377
i. Hospital Conditions During COVID-19	1378
ii. Systematic Failure to Protect Healthcare Workers	1381
II. Exploring Potential Reforms to Enforce Healthcare Workers' Rights.....	1383
A. Maintaining the Status Quo.....	1383
B. Further Restrictions on Healthcare Workers' Rights.....	1385
C. Rely on Administrative Action.....	1387
D. Expand Section 502.....	1389
E. Waive Section 8(g) Notice Requirements	1390

* J.D., 2021, Fordham University School of Law; B.A., 2013, McGill University. I would like to thank Professor Aditi Bagchi for her guidance, as well as the *Fordham Urban Law Journal* editorial staff for their feedback and support. I would also like to thank my friends and family for their encouragement, especially my parents, my sister Mary Coryea, and my friend Celia Goble.

F. Allow Healthcare Workers to at Any Time Refuse to Perform Dangerous Work.....	1392
G. Expand Section 7 Protections.....	1393
III. Allowing Healthcare Workers to Protect Their Safety	
Through Concerted Activity	1394
A. Reconciling Section 7 with the Healthcare Industry	1394
B. The Importance of Allowing Healthcare Workers to Refuse Hazardous Work	1395
C. Rationale for Employer Responsibility	1397
D. The Advantages of Worker over Agency Action.....	1398
E. Advantages of a Collective over an Individual Right	1400
F. Advantages of Section 7 over Section 502	1401
G. Advantages of Expanding Section 7 Protections	1402
Conclusion.....	1402

INTRODUCTION

On March 1, 2020, the first confirmed case of the novel coronavirus (COVID-19) was identified in New York City.¹ Within weeks, New York City became the epicenter of a major COVID-19 outbreak in the United States.² Hospitals found themselves unprepared for the flood of contagious patients who needed care.³ Earlier that March, managers had confiscated masks from worried nurses,⁴ and they suddenly found themselves without enough ventilators to go around.⁵

At one Manhattan hospital, Mount Sinai West, staff were forced to use garbage bags as makeshift protective gear and reuse disposable surgical

1. Joseph Goldstein & Jesse McKinley, *Coronavirus in N.Y.: Manhattan Woman Is First Confirmed Case in State*, N.Y. TIMES (Mar. 5, 2020), <https://www.nytimes.com/2020/03/01/nyregion/new-york-coronavirus-confirmed.html> [<https://perma.cc/R6P9-LV75>].

2. Consider This From NPR, *New York City, U.S. Epicenter, Braces for Peak*, NPR (Mar. 24, 2020, 5:29 PM), <https://www.npr.org/2020/03/24/820610818/new-york-city-u-s-epicenter-braces-for-peak> [<https://perma.cc/B7LH-K8G7>].

3. See Jessica Glenza, Ankita Rao & Alexandra Villarreal, *'It's What Was Happening in Italy': The Hospital at the Center of New York's COVID-19 Crisis*, GUARDIAN (Mar. 27, 2020, 1:59 PM), <https://www.theguardian.com/us-news/2020/mar/27/new-york-coronavirus-elmhurst-hospital> [<https://perma.cc/229Y-KUXC>].

4. See HEALTH PROS. & ALLIED EMPS., EXPOSED & AT-RISK 6 (2020) [hereinafter HPAAE], https://www.hpae.org/wp-content/uploads/2020/10/HPAAE-COVID-19-White-Paper_FINAL_Rev1.pdf [<https://perma.cc/9Z22-E86V>].

5. See Glenza et al., *supra* note 3.

masks.⁶ On March 17, 2020, one of the nurses, Kious Kelly, was diagnosed with COVID-19.⁷ The next day he texted his sister, “I’m okay. Don’t tell Mom and Dad. They’ll worry.”⁸ A few days later, he was dead.⁹ By mid-April, at least 26 medical workers in New York City had been killed by the COVID-19 virus.¹⁰

Medical staff have faced an unprecedented degree of danger since COVID-19 reached the United States. They were on the frontlines working with contagious patients, often with only makeshift protective equipment.¹¹ While the public has treated healthcare workers as heroes,¹² hospital management has exploited many by mismanaging existing protective equipment, pressuring infected staff to come to work before finishing quarantine, and failing to provide crucial information to unions.¹³

U.S. labor law affords workers a variety of protections against unsafe working conditions. For example, Section 502 of the Labor Management Relations Act (LMRA) does not consider it a strike when workers refuse to perform dangerous tasks.¹⁴ The National Labor Relations Act (NLRA) allows workers to ensure their safety through protected concerted activity.¹⁵

6. Ebony Bowden, Carl Campanile & Bruce Golding, *Worker at NYC Hospital Where Nurses Wear Trash Bags as Protection Dies from Coronavirus*, N.Y. POST (Mar. 25, 2020, 4:23 PM), <https://nypost.com/2020/03/25/worker-at-nyc-hospital-where-nurses-wear-trash-bags-as-protection-dies-from-coronavirus/> [<https://perma.cc/582K-9AUG>].

7. *Id.*

8. Somini Sengupta, *A N.Y. Nurse Dies. Angry Co-workers Blame a Lack of Protective Gear*, N.Y. TIMES (Mar. 26, 2020), <https://www.nytimes.com/2020/03/26/nyregion/nurse-dies-coronavirus-mount-sinai.html> [<https://perma.cc/JF9W-TWSR>].

9. *See id.*

10. Julia Marsh, *Coronavirus Has Killed at Least 26 NYC Public Hospital System Workers*, N.Y. POST (Apr. 17, 2020, 10:05 AM), <https://nypost.com/2020/04/17/coronavirus-has-killed-26-employees-of-nyc-public-hospital-system/> [<https://perma.cc/ZKM2-N6KQ>].

11. Mariel Padilla, *‘It Feels Like a War Zone’: Doctors and Nurses Plead for Masks on Social Media*, N.Y. TIMES (Mar. 22, 2020), <https://www.nytimes.com/2020/03/19/us/hospitals-coronavirus-ppe-shortage.html> [<https://perma.cc/7LCB-7CF5>].

12. *See* Zinaria Williams, *Heroes Need Help, Too*, U.S. NEWS & WORLD REP. (Aug. 19, 2020), <https://www.usnews.com/news/healthiest-communities/articles/2020-08-19/health-care-workers-are-heroes-and-they-need-help> [<https://perma.cc/EYJ4-KN2A>] (citing “[n]ightly applause, online discounts, promotional tchotchkes and an ice cream truck in front of the hospital scooping complimentary sweets” as examples of public accolades for healthcare workers).

13. *See* HP AE, *supra* note 4, at 14.

14. *See* Labor and Management Relations Act § 502, 29 U.S.C. § 143. The ability to stop work without striking affords workers some protections. For example, if courts found that they were striking based on an economic dispute, their employer could hire permanent replacements. *See* James A. Gross, *Undermining Worker Safety and Health Protection Through Statutory Interpretation*, 36 HOFSTRA LAB. & EMP. L.J. 225, 256 (2019).

15. *See, e.g.*, National Labor Relations Act § 7, 29 U.S.C. § 157 (2018).

Additionally, the Occupational Safety and Health Administration (OSHA) provides regulatory protections to workers placed in dangerous situations.¹⁶

Unfortunately, healthcare workers' freedom to rely on these protections is limited. When healthcare workers were added to the NLRA in 1974, Congress was concerned that strikes or other work stoppages could disrupt patient care.¹⁷ It added Section 8(g), which stipulates that workers at healthcare institutions must give notice before engaging in concerted activity¹⁸ and limits their ability to negotiate with their employers for more effective safety measures.¹⁹ Under current case law, it is unclear how this would affect their freedom to refuse to perform dangerous work.

Although medical workers are covered by the NLRA, they face unique limitations on their right to engage in concerted activity and to protect their work safety. This Note advocates for labor law reforms to allow workers at healthcare facilities to advocate for their own safety. Part I describes existing legal frameworks. Part II explores different possibilities for reform. Part III recommends changes to Section 7 of the NLRA, which protects concerted activity, and Section 8(g), which limits healthcare workers' rights to engage in strikes and protests.

I. EXISTING FRAMEWORKS FOR WORKER SAFETY

Currently, few cases have directly addressed the rights of healthcare workers to protect their safety.²⁰ There are sources of law that address worker safety generally, but these do not touch on the specific needs of healthcare workers. The NLRA discusses the policy interest in keeping healthcare workers on the job while giving them the freedom to advocate for their rights.²¹ However, neither the statute nor subsequent case law address how this interest would apply during a public health crisis on the scale of the COVID-19 pandemic.

16. *See About OSHA*, OCCUPATIONAL SAFETY & HEALTH ADMIN., <https://www.osha.gov/aboutosha> [<https://perma.cc/3QMP-GN2W>] (last visited Aug. 3, 2021).

17. 120 CONG. REC. 11,147 (1974) (enacted).

18. *See id.* (stating that the notice requirement is “in the public interest to insure the continuity of health care to the community and the care and well being of patients”).

19. *See* Kenneth Dolin & Gary Eby, *The Duty to Bargain*, in *THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT* 879, 884 (John E. Higgins, Jr. ed, 6th ed., 2012).

20. *See id.* (listing most recent precedential cases involving healthcare workers' collective bargaining rights, few of which involve safety concerns).

21. The NLRA, first passed in 1935, governs relations between employers and labor unions and guarantees certain rights to employees when acting collectively. *See National Labor Relations Act (NLRA)*, CORNELL LEGAL INFO. INST., https://www.law.cornell.edu/wex/national_labor_relations_act_nlra [<https://perma.cc/C7XT-B263>] (last visited Aug. 23, 2021); *see also* 29 U.S.C. § 157.

As the global pandemic reached the United States, healthcare workers were more essential than ever but also more vulnerable. The scale of the outbreak was unprecedented, and medical staff had to learn on the job how to treat the COVID-19 virus and control its spread.²² As underprepared hospitals were flooded with contagious patients they did not know how to cure, the size of the pandemic and COVID-19's contagiousness created a crisis that the 1974 Congress could not have imagined when it added the carve out for healthcare workers to the NLRA.²³

The 1974 Congress placed limits on healthcare workers' right to engage in concerted activity with the idea that this right would have been primarily used to resolve economic conflicts between workers and managers.²⁴ For healthcare workers in such situations, continuity in patient care would be a priority.²⁵ During the past year, however, workers at healthcare facilities have risked their lives and well-being to treat contagious patients with little support from their employers and restricted bargaining rights.²⁶ The existing labor law framework cannot adequately address this issue and has fallen short of properly protecting workers.²⁷

A. Statutory Protections for Those Who Refuse to Perform Dangerous Work

Federal labor law currently contains two provisions that allow workers to refrain from work when they fear for their safety. The first, Section 502 of the LMRA, states that an employee is not striking if she refuses to work

22. See Christina Jewett & Robert Lewis, *As the Terror of COVID Struck, Health Care Workers Struggled to Survive. Thousands Lost the Fight*, KAISER HEALTH NEWS (Dec. 23, 2020), <https://khn.org/news/article/as-the-terror-of-covid-struck-health-care-workers-struggled-to-survive-thousands-lost-the-fight/> [https://perma.cc/Z8AJ-JQAN].

23. See Ceyla Pazarbasioğlu & M. Ayhan Kose, *Unprecedented Damage by COVID-19 Requires an Unprecedented Policy Response*, BROOKINGS INST. (July 10, 2020), <https://www.brookings.edu/blog/future-development/2020/07/10/unprecedented-damage-by-covid-19-requires-an-unprecedented-policy-response/> [https://perma.cc/L78M-57T9] (describing the COVID-19 pandemic as a “health crisis of a magnitude with no parallel in modern times,” and which requires a unique policy response).

24. See 29 U.S.C. § 158(g).

25. See Sabrina Kuriakose, *Nursing Home Workers at 30+ Facilities Across CT Set to Strike Starting May 14*, NEWS 8 (May 3, 2021, 9:58 AM), <https://www.wtnh.com/news/connecticut/nursing-home-workers-at-30-facilities-across-ct-set-to-strike-starting-may-14/> [https://perma.cc/EN47-YKWA].

26. See Gwynne Hogan, *“It’s Spreading Throughout the Hospital”: NYC Healthcare Workers Describe Dire Conditions as Coronavirus Patients Flood Wards*, GOTHAMIST (Mar. 25, 2020, 11:01 AM), <https://gothamist.com/news/coronavirus-hospitals-nurses-nyc-patients-flood-wards> [https://perma.cc/G6VF-KQDJ].

27. See James Brudney, *Forsaken Heroes: COVID-19 and Frontline Essential Workers*, 48 FORDHAM URB. L.J. 1, 3 (2019) (“[Essential workers] have not received . . . adequate workplace health and safety rights or protections.”).

because she reasonably fears for her safety.²⁸ The second, Section 7 of the NLRA, allows workers to abstain from work if they are enforcing a right in their collective bargaining agreement.²⁹

i. Section 502: Abnormally Dangerous Conditions

As described above, federal labor law allows workers to advocate for their own safety. The right to refuse hazardous work is most explicitly addressed in Section 502 of the LMRA. This provision provides that employees may refuse to perform a task if they act “in good faith” and “because of abnormally dangerous conditions for work.”³⁰ On its face, Section 502 gives employees fairly broad power to protect their own safety.

The National Labor Relations Board (Board), which oversees the enforcement of the NLRA, developed the following test: workers must demonstrate by a preponderance of the evidence (1) that they had a good-faith belief, (2) that working conditions were abnormally dangerous, (3) that they stopped work because of this belief, (4) that this belief is supported by ascertainable, objective evidence, and (5) the danger was an immediate threat to employee safety.³¹ Any work stoppage which meets these conditions is not a strike for the purposes of the NLRA. This applies even to unionized workers with a no-strike provision in their collective bargaining agreement.³²

The right underlying Section 502 is incredibly important to workers who may otherwise have to choose between keeping their jobs or risking their lives. In practice, however, its protections are limited. The provision does offer a loophole to avoid no-strike clauses, which is important because strikes are strictly controlled under American labor law.³³ However, Section 502 does not provide any affirmative rights.³⁴ Workers who rely on Section 502 may not face the consequences they would for striking, but the statute’s language does not guarantee them reinstatement or backpay.³⁵ It merely says that “the quitting of labor by an employee or employees in good faith because

28. The LMRA, also known as the Taft-Hartley Act, was an amendment to the NLRA passed in 1947. See *Labor*, CORNELL LEGAL INFO. INST., <https://www.law.cornell.edu/wex/labor> [<https://perma.cc/J6US-5XLJ>] (last visited Aug. 3, 2021).

29. *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 829 (1984).

30. 29 U.S.C. § 143; see *TNS, Inc. v. NLRB*, 296 F.3d 384, 402 (6th Cir. 2002) (holding that workers exposed to uranium without safety training or sufficient equipment faced “abnormally dangerous” conditions).

31. See *TNS, Inc.*, 329 N.L.R.B. 602, 603 (1999).

32. *Gateway Coal Co. v. United Mine Workers of Am.*, 414 U.S. 368, 386 (1974).

33. See Gross, *supra* note 14, at 252. It is unclear if Section 502 would apply to unionized workers with a no-strike clause in their collective bargaining agreement. See *id.* at 283.

34. See 29 U.S.C. § 143.

35. See *id.*

of abnormally dangerous conditions for work at the place of employment of such employee or employees [shall not] be deemed a strike.”³⁶ The provision does not truly empower workers to refuse unsafe work but only mitigates the potential consequences of doing so.

Even if the Board does grant workers reinstatement or back pay, in practice they may not receive it. This occurred most notoriously in *TNS, Inc. v. NLRB*.³⁷ In 1981, unionized employees at a manufacturing plant worked closely with depleted uranium.³⁸ The plant did not have adequate safety precautions and fell below standards set by the Tennessee Division of Radiological Health.³⁹ As the union tried to negotiate a new collective bargaining agreement with better safety provisions, they organized a walkout.⁴⁰ Management responded by hiring replacement workers.⁴¹

Litigation over the case dragged on for over 16 years.⁴² The Board ultimately held in favor of the employees and created the definitive test to determine whether a work stoppage is protected by Section 502.⁴³ After the final Board ruling, the case was appealed to the Sixth Circuit. The appellate court upheld the Board’s legal conclusions, but determined that the case had stretched on too long and that it was no longer practical to give the employees in *TNS* reinstatement or backpay.⁴⁴ Since *TNS*, there has been almost no litigation concerning Section 502.⁴⁵ While the case may not be the cause, the lack of subsequent litigation suggests that unions likely do not find the provision helpful.

Workers relying on Section 502 may have other concerns. Safety disputes may be subject to grievance mechanisms provided for in collective bargaining agreements. If these disputes go to arbitration, the Board will likely defer to the results, even if it undermines safety concerns.⁴⁶ There is also a relatively high standard for determining whether a work stoppage meets the criteria — refusals to work must be based on objective evidence that working conditions are abnormally dangerous.⁴⁷

36. *Id.*

37. 296 F.3d 384 (6th Cir. 2002).

38. *TNS, Inc.*, 329 N.L.R.B. 602, 603 (1999).

39. *Id.* at 604.

40. *Id.*

41. *Id.* at 605.

42. *See TNS, Inc. v. NLRB*, 296 F.3d 384 (6th Cir. 2002); *Oil, Chem. & Atomic Workers Int’l Union v. NLRB*, 806 F.2d 269 (D.C.C. 1986).

43. *TNS, Inc.*, 329 N.L.R.B. at 603.

44. *TNS, Inc.*, 296 F.3d at 404.

45. *See Sara Slynn, Protected Concerted Activity and Non-unionized Employee Strikes: Worker Rights in Canada in the Time of COVID-19*, 57 OSGOODE HALL L.J. 605, 619 (2020).

46. *See Yellow Freight Sys., Inc.*, 337 N.L.R.B. 568, 569 (2002).

47. *See Gateway Coal Co. v. United Mine Workers of Am.*, 414 U.S. 368, 386–87 (1974).

The scope of activities it covers is also unclear. While Section 502 applies to both unionized and non-unionized workers, it is not clear if it applies to concerted activity beyond strikes.⁴⁸ While Sections 7 and 8(g), discussed below, apply to a variety of activities, Section 502 is limited to work stoppages.⁴⁹ Its primary application appears to be helping unions work around “no strike” provisions in their collective bargaining agreements.⁵⁰

ii. Section 7: Protected Concerted Activity

Section 7 of the NLRA has also been used to protect worker safety, although it does not approach the topic as directly as Section 502. This section of the Act protects collective employee actions, such as unionizing, from employer retaliation. It allows workers “to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection.”⁵¹ As suggested by the statutory language, this generally applies to concerted group activity rather than individual action.

This section of the NLRA protects a variety of concerted activities, from encouraging union members to lobby politicians⁵² to posting obscenities about employers on Facebook.⁵³ Workers have also used it to protest unsafe working conditions. Perhaps the most famous case to address Section 7 rights in relation to safety is *NLRB v. Washington Aluminum Co.*, where a group of machinists was forced to work in an unheated shop in the middle of winter and, unable to bear the cold, seven walked out of work.⁵⁴ The Supreme Court held that the workers in *Washington Aluminum* had the right to protect their health and they were entitled to reinstatement and backpay.⁵⁵

Subsequent case law has expanded on this provision’s relationship to workplace safety. In *NLRB v. City Disposal Systems, Inc.*, an employee refused to drive a truck he considered too dangerous to be on the road.⁵⁶ The Court ultimately held that this refusal to work was protected concerted

48. See Anton Hajjar, *Issues Under the National Labor Relations Act During the Covid-19 Pandemic: Employee Rights to Refuse to Work in Unsafe Conditions, and Issues for Bargaining and Those Affecting Health Care Institutions*, INT’L LAWS. ASSISTING WORKERS NETWORK 2 (Sept. 13, 2020).

49. See *id.* at 15.

50. *Id.*

51. 29 U.S.C. § 157; see also 29 U.S.C. § 158(a)(1) (explaining it is an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title”).

52. See *Eastex, Inc. v. NLRB*, 437 U.S. 556, 569 (1978).

53. See *NLRB v. Pier Sixty, LLC*, 855 F.3d 115, 125 (2d Cir. 2017).

54. 370 U.S. 9, 10–11 (1962).

55. See *id.* at 17–18.

56. 465 U.S. 822, 824 (1984).

activity.⁵⁷ Although the employee made an individual decision, he acted to enforce a provision of his union's collective bargaining agreement, a contract negotiated between the union and employer to enforce the employees' rights.⁵⁸ By invoking the agreement, the Court held that the driver had acted collectively.⁵⁹ Since this case, an employee may be protected from retaliation if (1) she acts based on a reasonable belief that she is asked to perform a task she is not required to perform under her collective bargaining agreement and (2) her action is reasonably directed toward the enforcement of a right in the collective bargaining agreement.⁶⁰

Section 7 has some advantages over Section 502 as a mechanism to protect workplace safety. The criteria laid out in *City Disposal* rely on workers' subjective fear for their safety, rather than Section 502's more onerous objective standard.⁶¹ This is potentially useful in situations in which a worker must act quickly, without the time or means to determine whether their fear is objectively provable. In many hazardous situations, a worker likely lacks the chance to mull over the potential merits of their case before acting and are likely unaware of these specific labor provisions.

However, Section 7 has limits as a means of protecting workers. As described above, Section 7 is not a catch-all for any protest or work stoppage; it must be concerted and for "mutual aid."⁶² It only protects an individual worker's actions when she acts to enforce her collective bargaining agreement.⁶³ Workers who do not have a safety provision in their agreement may not act collectively for the purposes of the statute.⁶⁴ Non-unionized workers, who do not have collective bargaining agreements, have an even smaller universe of actions protected by Section 7.⁶⁵

Finally, Section 7 generally does not protect workers from retaliation if their actions undermine their union. In *Emporium Capwell Co. v. Western*

57. *See id.* at 841.

58. *See id.*

59. *See id.* at 832 ("[W]hen an employee invokes a right grounded in the collective-bargaining agreement, he does not stand alone. Instead, he brings to bear on his employer the power and resolve of all his fellow employees. When, for instance, James Brown refused to drive a truck he believed to be unsafe, he was in effect reminding his employer that he and his fellow employees, at the time their collective-bargaining agreement was signed, had extracted a promise from City Disposal that they would not be asked to drive unsafe trucks.").

60. *See id.* at 840.

61. *See id.*; *see also* 29 U.S.C. § 143. According to the Board, "[i]nquiry into the objective reasonableness of employees' concerted activity is neither necessary nor proper in determining whether that activity is protected." *Tamara Foods, Inc.*, 258 N.L.R.B. 1307, 1308 (1981), *aff'd sub nom.*, *Tamara Foods, Inc. v. NLRB*, 692 F.2d 1171 (8th Cir. 1982).

62. 29 U.S.C. § 157.

63. *See Gross, supra* note 14, at 264–65.

64. *See id.*

65. *See id.*

Addition Community Organization, the Supreme Court held that a picket was not protected concerted activity, as it was organized by a minority of union members.⁶⁶ Similarly, the statute does not protect “wildcat strikes,” or strikes organized without union approval.⁶⁷ Although individual employees may engage in protected concerted activity, the right is fundamentally intended for collective, group actions. The statute specifically refers to “concerted activity”; as the Court in *City Disposal* noted, the individual truck driver could only assert a right in his collective bargaining agreement due to “prior negotiating activities of his fellow employees.”⁶⁸ It is a right that an individual may assert on behalf of the group.⁶⁹

B. Regulatory Protections for Those Who Refuse to Perform Dangerous Work

While NLRA creates a framework for workers to protect their own rights, the federal government may also act directly against employers. OSHA, created through the Occupational Safety and Health Act (OSH Act), is responsible for monitoring workplace safety.⁷⁰ This agency is responsible for passing regulations to ensure workplace safety, inspecting workplaces to ensure compliance, and responding to worker complaints.⁷¹ It is, in other words, meant to prevent the existence of hazardous working conditions.

In addition to actively monitoring workplace safety, OSHA regulations have given workers another means of refusing unsafe work. Under Regulation 1977.12(b)(2), an employee faced with a choice “between not performing assigned tasks or subjecting himself to serious injury or death” may be protected from retaliation.⁷² This protection only applies if (1) the employee’s apprehension of death or injury is reasonable, (2) there is insufficient time to eliminate the danger “through resort to regular statutory enforcement channel,” and (3) the employee unsuccessfully sought “a correction of the dangerous condition” from his employer.⁷³

This regulation has survived a challenge before the Supreme Court. In *Whirlpool Corp. v. Marshall*, the Court held that Regulation 1977.12(b)(2)

66. 420 U.S. 50, 52 (1975).

67. A wildcat strike is “[a] strike not authorized by a union or by a collective-bargaining agreement.” *Wildcat Strike*, BLACK’S LAW DICTIONARY (11th ed. 2019).

68. NLRB v. *City Disposal Sys., Inc.*, 465 U.S. 822, 832 (1984).

69. *See id.*

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

71. *See OSHA Worker Rights and Protections*, OCCUPATIONAL SAFETY & HEALTH ADMIN., <https://www.osha.gov/workers> [<https://perma.cc/3883-JBFN>] (last visited Aug. 3, 2021).

72. 29 C.F.R. § 1977.12(b)(2) (2021).

73. *Id.*

complies with the OSH Act.⁷⁴ There, management fired two maintenance workers who refused to do repairs over 20 feet above the ground with only a flimsy safety net for protection.⁷⁵ Earlier, other employees had been injured performing the same task and, tragically, one had fallen through the safety net and died.⁷⁶ The workers argued that the OSHA regulation allowed them to refuse the task without being fired. The Court held that the OSHA regulation was a valid interpretation of the OSH Act.

However, the Court stated that OSHA did not have the authority to create a “strike with pay” provision.⁷⁷ The worker was reinstated, but he was not entitled to back pay for the period when he refused to work.⁷⁸ Further, as the Court noted, the regulation does not entitle employees to pressure their employers to correct the dangerous conditions.⁷⁹ *Whirlpool* made it clear that the regulation is not meant as a means of leveraging employers, but as a last resort when workers face death or serious injury.

In addition to the lack of backpay, there are other reasons why this regulation may not adequately protect workers’ safety. Its use of an objective reasonable person standard sets a higher evidentiary standard than either Section 502 or Section 7,⁸⁰ and OSHA strongly encourages workers to first try to resolve safety issues internally.⁸¹ The agency does not have the budget or manpower to fully enforce its regulations even outside the context of a pandemic.⁸² It also faced a massive backlog during the east coast’s first wave of COVID-19.⁸³ This regulation is a risky last resort for employees, enforced by an often overwhelmed agency.

74. 445 U.S. 1, 22 (1980).

75. *See id.* at 4.

76. *See id.* at 5.

77. *Id.* at 17.

78. *Id.* at 22.

79. *Id.* at 21.

80. The OSHA regulation uses an objection reasonable person standard to determine danger. *See* 29 C.F.R. § 1977.12(b)(2) (2021); *see also* John B. Flood, *Revisiting the Right to Refuse Hazardous Work Amidst the Anthrax Crisis of 2001*, 5 U. PA. J. LAB. & EMP. L. 545, 568 (2003). Section 502 allows workers to refuse work if they have a good-faith belief supported by objective evidence. *See* TNS, Inc., 329 N.L.R.B. 602, 605 (1999). Section 7, by contrast, does not require workers to act based on objective evidence. *See* Tamara Foods, Inc., 258 N.L.R.B. 1307, 1308 (1981).

81. *See Workers’ Right to Refuse Dangerous Work*, OCCUPATIONAL SAFETY & HEALTH ADMIN., <https://www.osha.gov/workers/right-to-refuse> [<https://perma.cc/7E7W-K958>] (last visited Aug. 3, 2021).

82. *See, e.g.*, William Glaberson, *Is OSHA Falling Down on the Job?*, N.Y. TIMES (Aug. 2, 1987), <https://www.nytimes.com/1987/08/02/business/is-osha-falling-down-on-the-job.html> [<https://perma.cc/65SB-V4TZ>].

83. *See* David Sparkman, *Backlog Hinders OSHA’s Handling of COVID-19 Complaints*, EHS TODAY (Oct. 2, 2020), <https://www.ehstoday.com/covid19/article/21143644/backlog-hinders-oshas-handling-of-covid19-complaints> [<https://perma.cc/8JMZ-7T9L>].

C. Healthcare Workers' Rights Under Existing Labor Law

For the past several decades, workers at healthcare institutions have been covered by the NLRA and the legal frameworks described above. However, there are limitations exclusive to workers in the healthcare field. When they were added to the NLRA in 1974, there were concerns that any work stoppages could endanger patients.⁸⁴ Congress addressed these concerns through Section 815(g), which requires that unionized workers at any healthcare institution give ten days' notice before "engaging in any strike . . . or other concerted refusal to work."⁸⁵ Employees who violate these notice requirements are subject to sanctions under Section 8(d) and lose their status as employees for the purposes of the NLRA.⁸⁶ This sanction would be no mere slap on the wrist but would strip workers of substantial legal protections.

Section 8(g) applies to any worker employed at a healthcare institution.⁸⁷ The Board defines this rather broadly as "[h]ospitals, medical and dental offices, social services organizations, child care centers and residential care centers with a gross annual volume of at least \$250,000 . . . for nursing homes and visiting nurses associations, the minimum is \$100,000."⁸⁸ Any employee directly employed by such a facility is therefore subject to Section 8(g) notice requirements.

However, while the provision applies to all workers employed by a healthcare facility, it does not apply to subcontractors or other workers who work on the premises but are not directly employed by facility.⁸⁹ Only healthcare employees of healthcare employers need to comply with Section

84. 120 CONG. REC. 11,147 (1974) (stating that Congress added notice provisions because "[i]t is in the public interest to insure the continuity of health care to the community and the care and well being of patients"); see also 1199 Nat'l Union of Hosp. & Health Care Emps., 232 N.L.R.B. 443, 446 (1977).

85. 29 U.S.C. § 158(g). The Senate Report accompanying the 1974 Health Care Amendments did suggest that there should be a carve out. It stated that "a labor organization will not be required to serve a ten day notice or to wait until the expiration of the ten day notice when the employer has committed unfair labor practices as in *Mastro Plastics Corp. v. NLRB*." S. REP. No. 93-766, at 4 (1974). In *Mastro Plastics Corp. v. NLRB*, an employer unlawfully tried to replace an existing union with one more sympathetic to management. 350 U.S. 270, 272-73 (1956).

86. See 29 U.S.C. § 158(d).

87. See *id.* § 158(g).

88. *Jurisdictional Standards*, NLRB, <https://www.nlr.gov/about-nlr/rights-we-protect/the-law/jurisdictional-standards> [<https://perma.cc/KTQ9-BV3T>] (last visited Aug. 10, 2021).

89. See *NLRB v. IBEW Local Union No. 388*, 548 F.2d 704, 711 (7th Cir. 1977) (holding that electrical workers employed by a contractor could strike and protest on hospital grounds without giving ten days' notice); see also *Laborers' Int'l Union of N. Am., Local 1253*, 248 N.L.R.B. 244, 247 (1980) (holding that non-health care employees of non-health care employers are not subject to Section 8(g), even if they work at a hospital).

8(g) notice requirements.⁹⁰ Subcontractors, or employees of another business that share the building, do not need to give notice for protests or work stoppages that happen to take place on the premises of, for example, a nursing home; they would only give notice for activity directed at the nursing home.⁹¹ Provided their work stoppage does not interfere with patient care, sub-contractors would likely be exempt from notice requirements.

The Board and federal courts of appeals have generally applied Section 8(g) to unionized workers.⁹² Unrepresented employees are often not required to give notice, even when they act collectively.⁹³ In *NLRB v. Long Beach Youth Center, Inc.*, for example, youth center staff were not a union for the purposes of Section 8(g), although they organized a work stoppage as a protest and were actively trying to unionize.⁹⁴ In *Kapiolani Hospital v. NLRB*, an unrepresented hospital ward clerk participated in a nurses' strike.⁹⁵ Although she had not given notice before joining the strike and she refused to cross the picket line, the court held that she had not violated Section 8(g).⁹⁶

It is not clear from the plain language of the statute which activity is subject to Section 8(g). The provision rather vaguely refers to "any strike . . . or other concerted refusal to work at any health care institution."⁹⁷ The Board has held that it may apply to "all forms of picketing and not just to that which involves a work stoppage."⁹⁸ It has required notice even when

90. See *IBEW Local Union No. 388*, 548 F.2d at 711; *Laborers' Int'l Union of N. Am., Local 1253*, 248 N.L.R.B. at 246.

91. See *Laborers' Int'l Union of N. Am., Local 1253*, 248 N.L.R.B. at 246.

92. See, e.g., *Montefiore Hosp. & Med. Ctr. v. NLRB*, 621 F.2d 510, 514 (2d Cir. 1980); see also *NLRB v. Long Beach Youth Ctr., Inc.*, 591 F.2d 1276, 1278 (9th Cir. 1979). According to the Bureau of Labor Statistics, 8.3% of healthcare support workers are unionized, as are 13.7% of healthcare practitioners in the private sector. *Union Affiliation of Employed Wage and Salary Workers by Occupation and Industry*, U.S. BUREAU LAB. STAT. (Jan. 22, 2021), <https://www.bls.gov/news.release/union2.t03.htm> [<https://perma.cc/2RBG-DGMJ>]. Around 17% of nurses are unionized, and interest in union membership has increased dramatically among healthcare workers during the COVID-19 pandemic. See Ian Prasad Philbrick & Reed Abelson, *Health Care Unions Find a Voice in the Pandemic*, N.Y. TIMES (Jan. 29, 2021), <https://www.nytimes.com/2021/01/28/health/covid-health-workers-unions.html> [<https://perma.cc/D5D7-VXDG>]; see also Aneri Pattani, *Health Workers Unions See Surge in Interest Amid Covid*, KAISER HEALTH NEWS (Jan. 12, 2021), <https://khn.org/news/article/health-workers-unions-see-surge-in-interest-amid-covid/> [<https://perma.cc/58BG-GH8N>] (noting 70% of nurses voted to unionize).

93. See *Kapiolani Hosp. v. NLRB*, 581 F.2d 230, 233 (9th Cir. 1978) (stating that "Section [8(g)] does not speak of unrepresented individuals nor small groups of unrepresented individuals").

94. 591 F.2d at 1278.

95. 581 F.2d at 233.

96. See *id.* at 234.

97. 29 U.S.C. § 158(g).

98. Dist. 1199, Nat'l Union of Hosp. & Health Care Emps., 256 N.L.R.B. 74, 76 (1981).

nurses collectively refuse to work voluntary overtime.⁹⁹ In *New York State Nurses Ass'n*, hospital management frequently relied on nurses to volunteer for extra shifts, which cut into their meal breaks.¹⁰⁰ Frustrated, the unionized nurses all began refusing overtime on the same day.¹⁰¹ The NLRB held that they should have given notice, as the hospital struggled to schedule surgeries during their protest.¹⁰² The Ninth Circuit came to a similar decision in *SEIU, United Healthcare Workers-West v. NLRB*.¹⁰³

Short work stoppages or protests may also be subject to Section 8(g) notice requirements, even if these activities do not harm patients.¹⁰⁴ In *National Union of Hospital & Health Care Employees*, for example, employees protested outside of a hospital while off duty and without blocking the entrance.¹⁰⁵ Relying on a strict reading of the statute, the Board held that the employees still should have provided ten days' notice before organizing the protest.¹⁰⁶ It reasoned that the public interest in healthcare outweighed the right to protest, even if the protest did not immediately threaten patient care.¹⁰⁷

Section 8(g) may apply differently to different types of strikes. For example, courts have held that it may not apply to people who strike to support other workers, known as a sympathy strike.¹⁰⁸ The Second Circuit allowed two doctors to engage in a sympathy strike without giving notice.¹⁰⁹ However, the Board has been less lenient with unions that encourage members to engage in sympathy strikes.¹¹⁰ Similarly, "wildcat strikes," which are strikes not sanctioned by a union, may be protected and was in *East Chicago Rehabilitation Center, Inc. v. NLRB*, which allowed employees to walk out of work without notifying their union or submitting ten days'

99. See *N.Y. State Nurses Ass'n*, 334 N.L.R.B. 798, 798 (2001); see also *SEIU, United Healthcare Workers-W. v. NLRB*, 574 F.3d 1213, 1214 (9th Cir. 2009).

100. 334 N.L.R.B. at 798–99 (2001).

101. See *id.* at 799.

102. See *id.* at 801.

103. 574 F.3d at 1214 (holding that unionized workers at a hospital should have given more than four days' notice before declining to work overtime).

104. See Dist. 1199, *Nat'l Union of Hosp. & Health Care Emps.*, 232 N.L.R.B. 443, 443 (1977); see also *N.Y. State Nurses Ass'n*, 334 N.L.R.B. at 801.

105. *Dist. 1199, Nat'l Union of Hosp. & Health Care Emps.*, 232 N.L.R.B. at 443.

106. See *Dist. 1199, Nat'l Union of Hosp. & Health Care Emps.*, 232 N.L.R.B. at 445.

107. See *id.*

108. A sympathy strike is organized by "union members who have no grievance against their own employer but who want to show support for another union involved in a labor dispute." *Sympathy Strike*, BLACK'S LAW DICTIONARY (11th ed. 2019).

109. See *Montefiore Hosp. & Med. Ctr. v. NLRB*, 621 F.2d 510, 519 (2d Cir. 1980).

110. See *Hosp. & Institutional Workers' Union, Local 250*, 255 N.L.R.B. 502, 507 (1981) (holding that a union which subtly encouraged its members to engage in a sympathy strike was required to give notice under Section 8(g)).

notice.¹¹¹ A small, disorganized work stoppage would have been less disruptive to patient care than a strike organized by the union.

When deciding whether home health aides should have given notice before a work stoppage, the Second Circuit has argued that analyzing the risk of harm to patients is more important than actual harm.¹¹² However, when determining whether a wildcat strike falls under 8(g), the Seventh Circuit asked whether a strike caused inconvenience or actual danger.¹¹³ There is not a consensus among appellate courts on which line of reasoning should be adopted. However, there is a larger internal issue as there is a gap in Section 8(g)'s application to safety. Most existing case law exploring the contours of Section 8(g) focuses on compensation or overtime.¹¹⁴ It has not been litigated in situations in which healthcare workers feared for their safety, and it is unclear if notice requirements would apply if a unionized healthcare worker refused to perform work in unsafe conditions.

There has been extensive litigation on safety-related work stoppages in other fields. However, this line of cases has run parallel to those concerning workers in health care, without intersecting. Now that healthcare workers are on the front lines of a major public health crisis, this gap in the law has taken on new significance.¹¹⁵ Since the outbreak of COVID-19, large numbers of hospital employees have not been able to trust that their workplaces are safe.¹¹⁶ As they try to advocate for better personal protective equipment (PPE) and contact tracing,¹¹⁷ it is not clear to what extent they can rely on strikes to do so.

D. Healthcare Workers' Safety During the COVID-19 Pandemic

Existing legal frameworks were not designed for a public health crisis on the scale of the recent pandemic or for a disease as contagious as COVID-19. Many healthcare workers found themselves providing direct care to contagious patients without adequate safety training or PPE.¹¹⁸ Despite some statutory and regulatory protections, workers had little recourse if they

111. 710 F.2d 397, 403–04 (7th Cir. 1983).

112. *NLRB v. Special Touch Home Care Servs.*, 708 F.3d 447, 460 (2d Cir. 2013).

113. *E. Chi. Rehabilitation Ctr., Inc.*, 710 F.2d at 404.

114. *See* Hajjar, *supra* note 48, at 18–22 (citing and describing a collection of cases concerning Section 8(g)).

115. *See id.* at 17 (“Issues of refusals to work in dangerous conditions may arise in the health care setting.”)

116. *See* HPAAE, *supra* note 4, at 8.

117. Hajjar, *supra* note 48, at 6.

118. *See* HPAAE, *supra* note 4, at 7.

felt their safety was at risk.¹¹⁹ Hospitals struggled with both the danger the disease posed to staff and with the overwhelming number of patients.¹²⁰

i. Hospital Conditions During COVID-19

In early 2020, the U.S. medical community found itself unprepared for the COVID-19 pandemic. This was due in part because of the sheer scale of the pandemic.¹²¹ During the first wave of COVID-19 in the United States, hospitals around the country were overwhelmed and understaffed.¹²² Many hospitals in areas affected by the virus did not have enough staff, beds, or equipment to treat the influx of patients.¹²³ When the pandemic first peaked in New York City, hospitals operated at nearly triple their normal capacity.¹²⁴

Many hospitals cited maintaining qualified workers as one of their most significant challenges.¹²⁵ While best practice at an emergency room is to provide one nurse for every four patients, some New York City nurses found themselves treating as many as 23 patients.¹²⁶ As a result, healthcare workers were stretched dangerously thin. According to Anne, a tristate area x-ray technician who worked closely with COVID-19 patients, her department did not have sufficient staff to handle the pandemic in New York City.¹²⁷ Even working significant overtime, she and her colleagues struggled to provide adequate care.¹²⁸

In addition to staffing, hospitals struggled simply to house patients. In March and April of 2020, New York area hospitals opened unused wings and converted their pediatric wards in order to accommodate COVID-19

119. *See id.* at 15.

120. *See* Reed Abelson, *Covid Overload: U.S. Hospitals Are Running Out of Beds for Patients*, N.Y. TIMES (Nov. 27, 2020), <https://www.nytimes.com/2020/11/27/health/covid-hospitals-overload.html> [<https://perma.cc/GF7D-U4WV>].

121. *See id.*

122. *See id.*

123. *See id.*

124. *See* Brian M. Rosenthal et al., *Why Surviving the Virus Might Come Down to Which Hospital Admits You*, N.Y. TIMES (Dec. 25, 2020), <https://www.nytimes.com/2020/07/01/nyregion/coronavirus-hospitals.html> [<https://perma.cc/GV5L-WNB5>].

125. *See* U.S. DEP'T OF HEALTH & HUM. SERVS., OEI-06-20-00300, HOSPITAL EXPERIENCES RESPONDING TO THE COVID-19 PANDEMIC: RESULTS OF A NATIONAL PULSE SURVEY MARCH 23–27, 2020 (2020) [hereinafter DHHS SURVEY], <https://oig.hhs.gov/oei/reports/oei-06-20-00300.pdf> [<https://perma.cc/N4BG-MZR9>].

126. Rosenthal et al., *supra* note 124.

127. *See* Telephone Interview with Anne Smith (Oct. 16, 2020) [hereinafter Smith] (on file with author). To keep the source's name confidential, a pseudonym is used.

128. *See id.*

patients.¹²⁹ Hospitals also faced massive equipment shortages. Since COVID-19 entered the United States, hospitals struggled to obtain essentials such as beds, gloves, test kits, and ICU medications.¹³⁰

The COVID-19 pandemic was unique not only in its scale, but also in the threat it posed to medical staff. Nurses and other healthcare workers risk contracting the disease when they treat patients who test positive for COVID-19. They are then at risk of death or illness, and may spread the virus to their colleagues or other patients.¹³¹ Anne, the X-ray technician, described going from patient to patient, and physically maneuvering each into her equipment, and then moving onto the next. “We became vectors for the disease,” she claimed.¹³²

As the virus spread across the country, hospitals struggled to adequately protect their staff from the virus. This was not due entirely to mismanagement; after all, facilities could not conjure equipment from thin air. However, many hospitals failed to take actions that could have minimized the risk. Several refused to disclose whether their employees had tested positive for the virus, even when unions specifically requested this information.¹³³ Some managers also pressured potentially contagious

129. See Miguel Marquez & Sonia Moghe, *Inside a Brooklyn Hospital That is Overwhelmed with COVID-19 Patients and Deaths*, CNN (Mar. 31, 2020, 2:46 PM), <https://www.cnn.com/2020/03/30/us/brooklyn-hospital-coronavirus-patients-deaths/index.html> [<https://perma.cc/C2RF-D7KK>].

130. See *Demoralized Health Workers Struggle as Coronavirus Numbers Surge*, L.A. TIMES (Dec. 11, 2020, 3:56 PM), <https://www.latimes.com/world-nation/story/2020-12-11/demoralized-health-workers-struggle-as-virus-numbers-surge> [<https://perma.cc/HH7W-SHQG>]; Daniel Joseph Finkenstadt, Robert Handfield & Peter Guinto, *Why the U.S. Still Has a Severe Shortage of Medical Supplies*, HARV. BUS. REV. (Sept. 17, 2020), <https://hbr.org/2020/09/why-the-u-s-still-has-a-severe-shortage-of-medical-supplies> [<https://perma.cc/36PP-HAXF>]. The U.S. Navy tried to ease the burden on New York City hospitals by sending in the USNS Comfort, a fully equipped hospital ship, to treat non-COVID-19 patients. However, it ultimately departed from New York City after treating only 182 patients. See Gidget Fuentes, *Beyond Mercy: Navy's COVID-19 Hospital Ship Missions and the Future of Medicine at Sea*, USNI NEWS (May 26, 2020, 9:54 AM), <https://news.usni.org/2020/05/25/beyond-mercy-navys-covid-19-hospital-ship-missions-and-the-future-of-medicine-at-sea> [<https://perma.cc/3ELE-ZVSD>].

131. See HPAAE, *supra* note 4, at 14, 22.

132. Smith, *supra* note 127.

133. Many healthcare facilities failed to satisfy their regulatory obligations under OSHA to log incidents in which employees contracted COVID-19, where the incidents occurred, and how many days COVID-positive employees were absent from work. They also failed to share this information with unions. See generally *Employer Safety Violation List*, HEALTH PROS. & ALLIED EMPs. [hereinafter *HPAAE Violation List*], <https://www.hpae.org/2020/10/hpae-osha-peosha-complaint-list/> [<https://perma.cc/CM5V-P3UD>] (last visited Aug. 13, 2021). It is firmly established in case law that employers have a duty to disclose information to unions. See, e.g., NLRB v. ACME Indus. Co., 385 U.S. 432, 435–36 (1967) (holding that employers have a general obligation to provide unions with information they need to carry out their duties); NLRB v. Truitt Mfg. Co., 351 U.S. 149, 152–53 (1956) (holding that employers have

employees to return to work before completing two full weeks of quarantine.¹³⁴

One of the largest issues healthcare workers faced was caused by a combination of the virus's scale and contagiousness. While hospitals struggled to find adequate staff to treat the influx of patients, they also had to protect existing staff from catching the disease. This could best be accomplished through the use of PPE, which was in short supply.¹³⁵ Few healthcare facilities had adequate N95 respirators and were forced to use any alternative available or to find ways to decontaminate masks.¹³⁶ Many hospitals and nursing homes simply did not have the necessary equipment to protect their staff.

Hospitals and other medical facilities faced serious challenges in trying to provide staff with equipment and caring for contagious patients. However, according to accounts from unions and workers, employers often failed to do the bare minimum to protect their employees' safety. In the early days of the virus, some healthcare institutions forbade workers from wearing masks and even confiscated respirators which workers had brought from home.¹³⁷ As the pandemic progressed, even nurses who provided direct care to COVID-19 patients had to use makeshift PPE or reuse N-95 respirators, which may or may not have fit properly.¹³⁸

Some healthcare facilities resorted to using carcinogenic chemicals to clean N-95 respirators for reuse.¹³⁹ When hospitals did receive PPE, some gave it to the highest-ranking staff, rather than those who spent the most time treating COVID-19 patients.¹⁴⁰ Hospitals also pressured workers exposed to the virus to return to work early, disregarding quarantine guidelines.¹⁴¹ Many employers also failed to maintain or provide records of which

a responsibility to disclose some financial information as part of their duty to bargain in good faith).

134. See HP AE, *supra* note 4, at 14.

135. See *id.* at 9.

136. See Chris Hamby, *They Evoke Darth Vader, but These Masks May Save Your Doctor's Life*, N.Y. TIMES (May 27, 2020), <https://www.nytimes.com/2020/05/27/us/coronavirus-masks-elastomeric-respirators.html?searchResultPosition=12> [https://perma.cc/D5KR-N5GX].

137. See HP AE, *supra* note 4, at 11.

138. See *id.* at 13.

139. See Kerri Jansen, *During the Coronavirus Pandemic, Hospitals Have Taken Unprecedented Steps to Disinfect N95 Face Masks*, C&EN (Apr. 27, 2020), <https://cen.acs.org/biological-chemistry/infectious-disease/During-the-coronavirus-pandemic-hospitals-have-taken-unprecedented-steps-to-disinfect-N95-face-masks/98/web/2020/04> [https://perma.cc/J52L-CBRJ].

140. See HP AE, *supra* note 4, at 12.

141. See *id.* at 7.

employees had tested positive for COVID-19,¹⁴² which made it difficult for OSHA or unions to track the spread within workplaces. These employers often withheld information about workplace spread from unions, despite a statutory requirement that they disclose such information upon request.¹⁴³

Notably, many healthcare workers stated that they were willing to continue working with COVID-19 patients.¹⁴⁴ Thousands came out of retirement during the pandemic,¹⁴⁵ those in non-essential fields have switched to working in ICUs,¹⁴⁶ and nursing students volunteered at clinics and vaccination sites.¹⁴⁷ Although healthcare workers were crucial in protecting the public from COVID-19, many felt that management did not adequately protect their safety; by November of 2020, 1,400 healthcare workers had died of COVID-19.¹⁴⁸

ii. Systematic Failure to Protect Healthcare Workers

As the first wave of COVID-19 hit the northeast, not only did employers often fail their employees, but government actors neglected to enforce sufficient safety standards. Regulatory guidelines did not adequately ensure safe working conditions. OSHA did not conduct on-site investigations during the pandemic and, according to some essential workers, was generally ineffective in its attempts to protect workers.¹⁴⁹ For several months, it only

142. See Letter from Kris Hoffman, Area Dir., Occupational Safety & Health Admin., U.S. Dep't of Lab. to IJKG Opco LLC (Sept. 30, 2020), <https://www.hpae.org/wp-content/uploads/2020/10/OSHA-CarePoint-Bayonne-FATALITY-CITATIONS-2020.pdf> [<https://perma.cc/69D7-JMLE>].

143. See *id.* The NLRA requires that employers provide reasonable information to unions upon request. In some types of workplaces, such as healthcare facilities, this duty may trump employees' right to privacy regarding their health. See Robert M. Verduyck & Susan K. Friedlaender, *Employee Privacy Rights in the Public and Private Employment Sector*, 68 MICH. BAR J. 608, 610 (1989).

144. See Julia Simons & Jenny Vaughan, *Sacrifice and Risk in the Time of COVID-19*, 7 FUTURE HEALTHCARE J. 158, 158 (2020).

145. See *id.*

146. See *She Came to New York to Help Fight COVID. She Walked into a "War Movie,"* PROPUBLICA (Apr. 14, 2020, 11:30 AM), <https://www.propublica.org/article/she-came-to-new-york-to-help-fight-covid-she-walked-into-a-war-movie> [<https://perma.cc/4PH4-2FCT>].

147. See Kilee Thomas, *MWSU Nursing Students Work the Frontlines of the COVID-19 Pandemic*, KQ2 (May 6, 2021, 5:58 PM), <https://www.kq2.com/content/news/MWSU-nursing-students-turn-the-COVID-19-pandemic-into-the—574349241.html> [<https://perma.cc/UJZ7-X5BX>].

148. See Danielle Renwick, *'Many of Us Have PTSD': Pennsylvania Nurses Strike amid Covid Fears*, GUARDIAN (Nov. 21, 2020, 5:15 PM), <https://www.theguardian.com/us-news/2020/nov/21/us-nurses-strike-coronavirus-fears-pennsylvania> [<https://perma.cc/U56C-X6GK>].

149. See Editorial, *'You're on Your Own,' Essential Workers Are Being Told*, N.Y. TIMES (Apr. 20, 2020), <https://www.nytimes.com/2020/04/20/opinion/osha-coronavirus.html> [<https://perma.cc/AC5Q-9MT5>].

responded to complaints by issuing letters to employers that violated safety requirements.¹⁵⁰ Many OSHA complaints did not lead to citations until several months after the violations occurred.¹⁵¹ The agency's response did not act as an effective deterrent when at-risk employees most needed government intervention.

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), an influential federation of unions,¹⁵² petitioned OSHA to issue an Emergency Temporary Standard for Infectious Diseases.¹⁵³ When the agency refused, AFL-CIO requested that the D.C. Circuit compel OSHA to issue an emergency standard.¹⁵⁴ This was also unsuccessful, although, as the AFL-CIO pointed out, COVID-19 has caused more deaths in less time than any other event since OSHA was founded.¹⁵⁵ Instead of a temporary standard, the Secretary of Labor chose to issue non-binding, optional guidance.¹⁵⁶ As healthcare workers on the east coast were at their most vulnerable, the agency failed to act.

In 2020, healthcare workers faced an unprecedented threat to their safety. The legal frameworks currently in place were not designed for a public health crisis of this scale, and they largely failed to protect workers. Even unionized workers frequently lacked adequate access to PPE.¹⁵⁷ Workers generally

150. *See id.*

151. *See OSHA Issues Citations Against Hackensack Meridian for COVID-19 Violations Following Investigation of Long-Term Care Worker Death*, HEALTH PROS & ALLIED EMPS. [hereinafter *HPAE OSHA Citations*], <https://www.hpae.org/2020/09/osha-issues-citations-against-hackensack-meridian-for-covid-19-violations-following-investigation-of-long-term-care-worker-death/> [<https://perma.cc/54BQ-264N>] (last visited Aug. 28, 2021) (stating that an OSHA citation issued in September 2020 was “the first citation of its kind nationwide during the COVID-19 pandemic”, although HPAE had filed multiple complaints months earlier).

152. The AFL-CIO is the largest labor federation in the United States. *See* TIMOTHY J. MINCHIN, *LABOR UNDER FIRE: A HISTORY OF THE AFL-CIO SINCE 1976* 2 (2017). Since its founding in 1955, the AFL-CIO has exercised a great deal of influence on legislation and national elections. *Id.* at 1–2. While its power has waned as union membership has declined, it is considered one of the most powerful lobbying groups in the country. *See id.* at 7–9.

153. *See* Press Release, Am. Fed'n of Lab. & Cong. of Indus. Orgs., *AFL-CIO Sues OSHA for Emergency Temporary Standard to Protect Workers* (May 18, 2020) [hereinafter *AFL-CIO Press Release*], <https://aflcio.org/press/releases/afl-cio-sues-osha-emergency-temporary-standard-protect-workers> [<https://perma.cc/8XYY-CZH5>].

154. *See id.*

155. *Emergency Petition for a Writ of Mandamus, and Request for Expedited Briefing and Disposition* at 5, *Am. Fed'n of Lab. & Cong. Of Indus. Orgs. v. Occupational Safety & Health Admin.*, (D.C. Cir. 2020) (No. 19-1158), 2020 WL 3125324.

156. *See id.*; *see also* Letter from Richard Trumka, President, Am. Fed'n of Lab. & Cong. of Indus. Org., to the Hon. Eugene Scalia, Sec'y of Lab., U.S. Dep't of Lab. 3 (Apr. 28, 2020), <https://aflcio.org/statements/letter-secretary-scalia-urging-action-protect-workers-covid-19-exposures-and-infections> [<https://perma.cc/XMJ2-R2PU>].

157. *See* Martha Mendoza & Kimberlee Kruesi, *Nurses Push Back on Pressure to Work Without Right Equipment*, ASSOC. PRESS (Apr. 16, 2020), <https://apnews.com/article/nursing->

have minimal protections from retaliation when they refuse to work in unsafe conditions.¹⁵⁸ Healthcare workers' right to engage in concerted activity is further limited by Section 8(g), which requires ten days' notice.¹⁵⁹ If workers are in imminent danger, this delay can be significant.¹⁶⁰ While there is a logic behind Section 8(g), and healthcare workers should have some limits on their freedom to stop work, they also deserve the means to protect themselves.

II. EXPLORING POTENTIAL REFORMS TO ENFORCE HEALTHCARE WORKERS' RIGHTS

This Part lays out a spectrum of potential policy proposals regarding healthcare workers' rights. As described above, there are multiple statutes and regulations that affect both workers' safety and healthcare workers' labor rights. There are, therefore, many avenues for legal reform, through legislation and regulation, and benefitting workers either collectively or individually. This Part also explores different perspectives as to how much freedom healthcare employees should have to stop work. This Part compares the advantages of maintaining the status quo, imposing further restrictions on healthcare workers, or seeking reform through OSHA, Section 502, and Section 7.

A. Maintaining the Status Quo

One should not take for granted that existing legal frameworks on hazardous work need reform. After all, Congress did not arbitrarily add notice requirements to the NLRA.¹⁶¹ It had valid concerns that patients would suffer if medical staff could organize a strike with no warning.¹⁶² Workers at healthcare institutions provide a necessary service. Even more so during a pandemic, their work is indispensable. It is unfortunate that so many are at risk from COVID-19, but there is nonetheless a compelling public interest in keeping medical staff at work during such times.

Further, healthcare workers, and even support staff also subject to 8(g), chose to enter a potentially dangerous field. Working at a hospital or nursing

care-mi-state-wire-ma-state-wire-santa-monica-virus-outbreak-f130a57491bd13c2798ddd4e8addbb4f [https://perma.cc/G7AA-MFA3].

158. See *supra* Sections I.A–C.

159. 29 U.S.C. § 158(g).

160. See Cristina Pelkas & Matthew Boissea, *Unmasked: A Comparative Analysis of the Physician's Ethical and Legal Duty to Treat During a Pandemic*, 20 MED. L. INT'L 211, 225 (2020) (stating that healthcare workers face a heightened risk of contracting COVID-19).

161. See 120 CONG. REC. 11,147 (1974) (demonstrating Congress's concerns that strikes or other work stoppages could disrupt patient care).

162. See *id.*

home will always carry some risk, even support staff will likely have contact with contagious patients. If a worker decides that she does not want to bear that risk, she is free to find other work. This is not an ideal choice, but one may argue that it does not necessitate changing the law.

One could also argue that hospital conditions during a pandemic are an anomaly. The United States has not faced a public health crisis on this scale since the 1918 Spanish flu entered the country nearly a century ago,¹⁶³ and it could very well be another century before we face such a widespread disease again. Healthcare facilities may not encounter a similar situation in the near future, in which they face a virus as contagious as COVID-19 that will effect as many people. Some of the issues they faced, such as PPE shortages, were not directly related to labor law and could be fixed logistically.

However, while there are arguments in favor of maintaining the current system, the pandemic has exposed major flaws in American labor law that must be addressed. Many essential workers are still in danger. As of the writing of this Note, COVID-19 has not been completely contained in the United States and attempts to vaccinate the population have only been successful regionally.¹⁶⁴ Healthcare workers across the country are still struggling to provide care to patients in overwhelmed hospitals. The legal protections in place now are not sufficient to help workers who are still risking their lives.

Even if an event on the scale of the COVID-19 pandemic is not guaranteed to be repeated in the near future, the pandemic has shown that there are gaps in our legislative and regulatory frameworks for essential healthcare employees. As it stands now, employees at healthcare facilities have little recourse if they are asked to perform life-threatening work. Despite the risks they have taken for public health, they have fewer protections than other workers when they engage in concerted activity. Without reforms, we may see these problems repeat themselves if we face another pandemic.

163. See Apoorva Mandavilli, *In N.Y.C.'s Spring Virus Surge, a Frightening Echo of 1918 Flu*, N.Y. TIMES (Aug. 25, 2020), <https://www.nytimes.com/2020/08/13/health/coronavirus-flu-new-york.html?searchResultPosition=16> [<https://perma.cc/DX4C-5BL4>].

164. See Lazaro Gamio & Amy Schoenfeld Walker, *See Which States Are Falling Behind Biden's Vaccination Goal*, N.Y. TIMES (June 3, 2021), https://www.nytimes.com/interactive/2021/06/03/us/virus-vaccine-states.html?name=style-coronavirus®ion=TOP_BANNER&block=storyline_menu_recirc&action=click&pgtype=Interactive&variant=1_Show&is_new=false [<https://perma.cc/2KYN-L6YK>]; Brittany Shammass & Lori Rozsa, *Coronavirus Vaccine Has Arrived, but Frustrated Americans Are Struggling to Sign Up*, WASH. POST (Jan. 3, 2021, 3:00 PM), <https://www.washingtonpost.com/health/2021/01/02/coronavirus-vaccine-has-arrived-frustrated-americans-are-struggling-sign-up/> [<https://perma.cc/S9NF-3DGR>].

These changes are especially necessary because many employers have shown that, absent a legal obligation, they will not protect their workers' safety.¹⁶⁵ Hospitals and nursing homes did struggle with circumstances beyond their control.¹⁶⁶ However, they also made decisions that put their employees and staff at risk, such as distributing PPE inequitably or pressuring workers to return from quarantine early.¹⁶⁷ Labor law, as it currently stands, largely leaves workers at their employers' mercy.

B. Further Restrictions on Healthcare Workers' Rights

Another possible reaction to COVID-19 is to reduce healthcare workers' right to stop work. Before determining the best means of expanding healthcare workers' right to refuse hazardous work, it is worth considering whether it is even ethical for them to do so. They are more necessary than ever during a pandemic, and there is arguably a public interest in their ability to refuse work.¹⁶⁸ Several states have enacted laws that prevent healthcare professionals from refusing to treat patients, and some specifically restrict healthcare workers from doing so during public health crises.¹⁶⁹

The basic policy rationale behind denying healthcare workers to stop work is obvious: if healthcare workers strike or otherwise stop work, then they are not caring for patients. From a certain point of view, this could outweigh concerns over healthcare workers' labor rights. The NLRA, as passed in 1947, excluded government and nonprofit hospitals.¹⁷⁰ When Congress finally added nonprofit hospitals to the NLRA in 1974, it added the ten days' notice requirement specifically to address concerns about patient welfare.¹⁷¹

These concerns are not groundless; a study of nurses' strikes in New York State between 1984 and 2004 found that prolonged strikes had a negative effect on in patient care.¹⁷² These concerns are heightened during a public

165. See Brudney, *supra* note 27, at 3.

166. See Tara Lagu, Rachel Werner & Andrew W. Artenstein, *Why Don't Hospitals Have Enough Masks? Because Coronavirus Broke the Market*, WASH. POST (May 21, 2020, 7:00 AM), <https://www.washingtonpost.com/outlook/2020/05/21/why-dont-hospitals-have-enough-masks-because-coronavirus-broke-market/> [<https://perma.cc/DJ93-6DU8>].

167. See Emmarie Huetteman, *Nurses and Doctors Sick with COVID Feel Pressured to Get Back to Work*, KAISER HEALTH NETWORK (Aug. 12, 2020), <https://khn.org/news/nurses-and-doctors-sick-with-covid-feel-pressured-to-get-back-to-work/> [<https://perma.cc/MG3M-36BG>].

168. See Carl H. Coleman, *Beyond the Call of Duty: Compelling Health Care Professionals to Work During an Influenza Pandemic*, 94 IOWA L. REV. 1, 3 (2008).

169. See *id.* at 23–24.

170. See Jonathan Gruber & Samuel A. Kleiner, *Do Strikes Kill? Evidence from New York State*, 4 AM. ECON. J. 127, 129 (2012).

171. 120 CONG. REC. 11,147 (1974).

172. Compare Stephen L. Thompson & J. Warren Salmon, *Strikes by Physicians: A Historical Perspective Toward an Ethical Evaluation*, 36 INT'L J. HEALTH SERVS. 331, 343–

health crisis; there is a strong public interest in keeping hospitals fully staffed when unprecedented numbers of people are dying of illness.¹⁷³ As one scholar noted, COVID-19 presented such a large threat to public health that “conceptual issues [came to] have real consequences.”¹⁷⁴

Some state governments have in fact, restricted healthcare workers’ right to refuse to treat patients.¹⁷⁵ New York State, for example, subjects physicians to professional discipline for “abandoning or neglecting a patient . . . in need of immediate professional care, without making reasonable arrangements for the continuation of such care.”¹⁷⁶ Other states have adopted provisions that specifically apply to healthcare workers during a pandemic or other public health crisis.¹⁷⁷

This basic idea is not limited to state law. Under the LMRA, the Attorney General may petition a federal court to issue a “national emergency” injunction to end a strike which: “(i) affects an entire industry or a substantial part thereof . . . and (ii) if permitted to occur or to continue, will imperil the national health or safety”¹⁷⁸ Under existing U.S. law, national well-being may be a higher priority than labor rights.

It is unclear to what degree unionized healthcare workers are protected by Section 502, which states that refusing work for safety reasons is not a strike.¹⁷⁹ It is also unclear to what extent such limitations on healthcare workers’ rights would be preempted by Section 502.¹⁸⁰ However, this would have a large impact on the rights of workers who lack union protection. Non-unionized healthcare employees currently have a fair amount of flexibility around Section 8(g)’s notice requirements, and courts have allowed them to engage in work stoppages.¹⁸¹ Suspending their protections under Section

44 (2006) (stating that there is not a definitive link between labor action to a drop in patient welfare), with Sylvester C. Chima, *Global Medicine: Is It Ethical or Morally Justifiable for Doctors and Other Healthcare Workers to Go On Strike?*, 14 BMC MED. ETHICS, Dec. 2013, at 7, <https://bmcmethics.biomedcentral.com/articles/10.1186/1472-6939-14-S1-S5#citeas> [<https://perma.cc/9BC2-DB9G>] (stating that harm to patients during a healthcare strike is greatly reduced if emergency services are still available).

173. See Konrad Szocik, *Conceptual Issues in COVID-19 Pandemic: An Example of Global Catastrophic Risk*, 29 CAMBRIDGE Q. HEALTHCARE ETHICS 199, 199 (2021) (illustrating the great impact of COVID-19 virus).

174. *Id.*

175. See Coleman, *supra* note 168, at 3.

176. N.Y. COMP. CODES R. & REGS. tit. 8, § 29.2(a)(1) (2011).

177. Maryland, Delaware, and South Carolina have passed mandatory-work provisions that apply to medical professionals. These were based on the Model State Emergency Health Powers Act, a draft law written at the request of the Centers of Disease Control and Prevention in 2001, in anticipation of a bioterrorist attack. See Coleman, *supra* note 168, at 24.

178. 29 U.S.C. § 178.

179. See Coleman, *supra* note 168, at 15.

180. See *id.*

181. See *Kapiolani Hosp. v. NLRB*, 581 F.2d 230, 234 (9th Cir. 1978).

502 would likely limit their protections from employer retaliation should they refuse to work when they feel unsafe.

Curtailing the right to engage in concerted activity under Section 7 would have a much broader impact. As with Section 502, non-unionized workers have much more flexibility to exercise these rights without giving notice under Section 8(g). However, unionized workers at healthcare facilities still have some freedom to engage in protected concerted activity. They may, for example, hold press conferences or engage in other activities that do not impact patient care.¹⁸² Under this proposal, they would no longer be able to engage in even these activities.

However, there are serious flaws to this approach. Healthcare facilities have not consistently acted in the best interests of their employees.¹⁸³ During the first wave of the pandemic, there were not large-scale problems with essential workers abandoning their patients. Rather, workers risked their lives as management failed to adequately protect their safety.¹⁸⁴ This policy would address an issue that does not actually exist while limiting the rights of workers to fix very real problems.

Additionally, restricting workers' right to protect themselves and engage in concerted activity would undermine decades of labor activism and the intent of the NLRA. It would also disproportionately affect unrepresented workers, who are already more vulnerable than their unionized colleagues and less likely to cause large-scale disruptions to patient care.

C. Rely on Administrative Action

Much of the law on safety-related work stoppages involves concerted activity on the part of employees. However, administrative agencies may take affirmative action to enforce safety standards. Instead of relying on union activity or worker action, OSHA could issue a temporary standard during public health crises.¹⁸⁵ This standard could expand on regulation 1977.12(b)(2), discussed above, to loosen the fairly stringent standard during emergency situations such as the COVID-19 pandemic.¹⁸⁶ This is similar to

182. See *Civil Serv. Emps. Ass'n v. NLRB*, 569 F.3d 88, 93 (2d Cir. 2009).

183. See generally HPAE, *supra* note 4.

184. See Jennifer Harlan, *Thousands of Philadelphia Area Nurses Plan to Strike as Virus Cases Surge and Their Working Conditions Worsen*, N.Y. TIMES (Dec. 23, 2020, 8:23 AM), <https://www.nytimes.com/live/2020/11/13/world/covid-19-coronavirus-updates/thousands-of-philadelphia-area-nurses-plan-to-strike-as-virus-cases-surge-and-their-working-conditions-worsen> [<https://perma.cc/VWZ3-VXQB>].

185. See AFL-CIO Press Release, *supra* note 153.

186. For further discussion of proposals to expand this regulation, see Flood, *supra* note 80, at 580–84.

what the AFL-CIO attempted to do when it pushed for an emergency OSHA standard in 2020.¹⁸⁷

Currently, the standard requires that an employee have an objectively reasonable “apprehension of death or injury” and that, “where possible, [she] must also have sought . . . a correction of the dangerous condition” from her employer before refusing to perform work.¹⁸⁸ This could be more flexible if, for example, the standard focused on a subjective fear. As shown by litigation concerning Section 502, it can sometimes be difficult for employees to realize on short notice if their fear has an objective basis and then later to prove so in court.¹⁸⁹

The regulation could also be temporarily amended to lower the standard for receiving accommodations from employers. While the text of the regulation does state that an employee is only required to seek corrections from management “where possible,”¹⁹⁰ the regulation is designed to be the last resort for employees facing imminent danger.¹⁹¹ The number of workers facing such danger is obviously much higher during a global pandemic than otherwise.¹⁹² Additionally, in practice, employers may not have the opportunity to perform a cost-benefit analysis before refusing to, for example, treat a contagious patient without PPE.¹⁹³

There is a logic behind choosing to pursue reform through OSHA. The agency was created to protect the public from danger in their workplaces and such a regulation would fall under its mandate. In *Whirlpool*, the Supreme Court held that the OSH Act allows it to pass such a regulation.¹⁹⁴ The agency also has some power to pass emergency standards.¹⁹⁵ As OSHA had some difficulty monitoring workplaces during the pandemic,¹⁹⁶ issuing a broader standard for employee self-help would allow it to protect workers without endangering its own inspectors.

While there are valid policy reasons to support this proposal, it is not an ideal solution. Even if OSHA were to amend its regulations, it may not be helpful in practice. As shown by OSHA’s inaction during the first wave of

187. See AFL-CIO Press Release, *supra* note 153.

188. 29 C.F.R. § 1977.12(b)(2) (2021).

189. See *TNS, Inc. v. NLRB*, 296 F.3d 284, 391 (6th Cir. 2002).

190. 29 C.F.R. § 1977.12(b)(2) (2021).

191. See *Flood*, *supra* note 80, at 581.

192. See *Szocik*, *supra* note 173, at 199.

193. See *Flood*, *supra* note 80, at 581.

194. *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 13 (1980) (stating that “[t]he regulation thus on its face appears to further the overriding purpose of the Act, and rationally to complement its remedial scheme”).

195. See AFL-CIO Press Release, *supra* note 153.

196. See *id.*

the virus, the agency is not always efficient or reliable.¹⁹⁷ It refused to issue an emergency temporary standard, despite months of lobbying and legal action from the AFL-CIO.¹⁹⁸ OSHA also refused to perform site visits during the pandemic and did not act on complaints for several months.¹⁹⁹ Given its difficulty handling the COVID-19 crisis, relying on OSHA is likely not the best means of improving healthcare workers' rights.

D. Expand Section 502

Worker's rights could also be protected by expanding Section 502 of the LMRA. Currently, this provision only provides that a worker does not engage in a strike when she refuses to work in "abnormally dangerous" conditions.²⁰⁰ This could be broadened to provide affirmative protections against retaliation. Congress could amend Section 502 to guarantee reinstatement and backpay for any fired workers, or the NLRB could begin interpreting it more expansively.²⁰¹

This provision already allows unionized employees to stop work, even if their collective bargaining agreement contains a no-strike provision. Offering affirmative protections would make this provision a more appealing option for employees facing hazardous conditions. It would also prevent outcomes like *TNS* in which the workers never recovered backpay awarded by the Board.²⁰² Expanding its reach in this way would make Section 502 much more useful to workers concerned with employer retaliation.

After all, Section 502 is in some ways well-suited to the specific safety concerns raised by the pandemic. It is somewhat narrowly focused on an employee's right to refuse hazardous work and does not protect the right to protest or picket.²⁰³ This would minimize disruptions caused by public protest, but it would still allow employees to protect their safety, which was a major concern for many workers during the pandemic.²⁰⁴

197. *See id.*

198. *See id.*

199. *See generally* HPAE, *supra* note 4.

200. 29 U.S.C. § 143.

201. *See* Michael H. LeRoy, *From Docks to Doctor Offices After 9/11: Refusing to Work Under "Abnormally Dangerous Conditions,"* 56 ADMIN. L. REV. 585, 638 (2004) (arguing that Section 502's vague wording and scant legislative history lends itself well to administrative clarification).

202. *See* *TNS, Inc. v. NLRB*, 296 F.3d 384, 404 (6th Cir. 2002).

203. *See* 29 U.S.C. § 143.

204. *See* LeRoy, *supra* note 201, at 594 (stating that Section 502 does not apply to most work stoppages); *see also* Scott Clement, Cece Pascual & Monica Ulmanu, *Stress on the Front Lines of COVID-19*, WASH. POST (Apr. 6, 2021), <https://www.washingtonpost.com/health/2021/04/06/stress-front-lines-health-care-workers-share-hardest-parts-working-during-pandemic/> [<https://perma.cc/92R2-ZXKN>].

However, despite the potential advantages of this reform, it is not a perfect solution. There are problems with the substance of Section 502, which could be addressed through administrative clarity. Yet even with such amendments, this provision may not be the best tool for protecting healthcare workers. It is not clear how courts would reconcile Section 502 with Section 8(g) notice requirements should a unionized employee refuse to work because she felt unsafe.²⁰⁵ Expanding the provision to include affirmative protections would therefore do little to help unionized healthcare workers and would predominantly benefit unrepresented employees who already have a broader range of activity exempt from notice requirements.

There are also concerns with how courts have interpreted Section 502. In *Yellow Freight System, Inc.*, for example, the Board was more concerned with enforcing arbitration decisions than looking to the case's underlying policy concerns.²⁰⁶ Even if the provision provides more protections than it does currently, workers must still convince arbitrators, the Board, and federal courts that their actions fall within the provision.²⁰⁷

E. Waive Section 8(g) Notice Requirements

Another approach is to remove limitations on workers in the medical industry. If Section 8(g) notice requirements are waived entirely in times of crisis, healthcare workers could advocate for themselves more effectively. If unionized healthcare workers could engage in work stoppages without providing notice, they would have essentially the same rights as any other group of workers covered by the NLRA.

Currently, healthcare workers must give their employers written notice ten days before any concerted activity that could disrupt patient care.²⁰⁸ While this is generally applied more strictly to unionized workers than to those who lack representation, it severely curtails the ability of healthcare workers to organize.²⁰⁹ As discussed in the previous section, this is not a mere formality; employees who violate the notice provisions of Section 8(g) lose many statutory protections.²¹⁰ This proposal would eliminate the notice requirement altogether during times of emergency. As with earlier

205. Coleman, *supra* note 168, at 15.

206. 337 N.L.R.B. 568, 568 (2002).

207. *See supra* Section I.A.i.

208. 29 U.S.C. § 158(g).

209. *See, e.g.,* Kapiolani Hosp. v. NLRB, 581 F.2d 230, 233 (9th Cir. 1978) (stating that Section 8(g) “does not speak of unrepresented individuals nor small groups of unrepresented individuals”); Alexandria Clinic, P.A., 339 N.L.R.B. 1262, 1263 (2003) (strictly applying the ten days’ notice requirement); N.Y. State Nurses Ass’n, 334 N.L.R.B. 798 (2001) (holding that refusing voluntary overtime is concerted activity for the purposes of 8(g)).

210. 29 U.S.C. § 158(d)(4).

recommendations, this could be triggered during a public health crisis, as defined by OSHA or the Center for Disease Control and Prevention (CDC).

It should be noted that the United States is not alone in requiring that medical professionals give notice before a work stoppage. Many other countries similarly require that hospitals be informed before a strike.²¹¹ However, even in jurisdictions where there is not a statutory requirement to give notice, workers have often informed their employers before stopping work. In some Canadian provinces, for example, healthcare workers have no notice requirements but have generally continued to care for the patients while on strike.²¹² This is partially due out of fear of bad publicity, as well as genuine concern for patients' welfare.²¹³ Whatever their reasons, medical professionals are unlikely to completely abandon those in their care.²¹⁴ Workers will not necessarily abuse their freedom if they do not have a notice requirement.

Without provision 8(g), healthcare workers would have more flexibility to engage in concerted activity, which could be used (1) for their own protection or (2) to put pressure on their employers. The first would occur as they could refuse to perform hazardous work without providing notice. This right to refuse work would give workers more leverage over management, as the ability to withhold labor is a powerful tool. This would not only allow them to avoid unsafe conditions, but it could allow them to organize protests or pickets with short notice. The extra ten days could be extremely helpful as they try to address workplace safety concerns, which have changed rapidly during the pandemic.

However, this proposal could cause major disruptions to hospitals during an already chaotic time. The logic behind Section 8(g) was that it could give healthcare facilities time to accommodate their patients before a strike.²¹⁵ While this provision has limited workers' leverage when negotiating with management, it still serves a useful purpose. Abandoning it entirely would potentially leave patients without care. Although some Canadian medical staff have continued to treat patients while on strike,²¹⁶ there is no guarantee that workers in the United States would do the same.

211. See Timo Knäbe & Carlos R. Carrión-Crespo, *The Scope of Essential Services: Laws, Regulations and Practices* 58–59 (Int'l Lab. Org., Working Paper No. 334, 2019).

212. See Eric Tucker, *Canada*, in REGULATING STRIKES IN ESSENTIAL SERVICES: A COMPARATIVE 'LAW IN ACTION' PERSPECTIVE 107, 135 (Moti (Mordehai) Mironi & Monika Schlachter eds., 2019) (listing Japan, Brazil, Sri Lanka, and Botswana as some countries which require notice before essential workers strike).

213. See *id.*

214. See *id.*

215. See 120 CONG. REC. 11,147 (1974).

216. See Tucker, *supra* note 212, at 135.

Additionally, no-strike clauses are fairly common in collective bargaining agreements.²¹⁷ The statutory right to strike would therefore have little to no effect for many unions. As a result, reform would disproportionately benefit unrepresented workers, who are already less beholden to Section 8(g) notice requirements. Logistically, it would not benefit the workers who most need change.

F. Allow Healthcare Workers to at Any Time Refuse to Perform Dangerous Work

Another alternative is to allow healthcare workers to refuse to perform dangerous work at any time. Under this proposal, any healthcare worker, regardless of her membership in a union, would be protected from retaliation if she subjectively feels unsafe and stops work. Unlike the previous recommendation, which gave workers a conditional right to refuse work, this would provide workers with an unfettered ability to protect themselves from danger.

Such an approach would allow workers at healthcare facilities to refuse to perform any task if they feel unsafe. If, for example, a nurse refuses to treat a contagious patient, their employer could not discipline them. Workers would have complete discretion to decide when they feel safe treating potentially dangerous patients. This would likely encourage employers to provide safe working conditions and adequate PPE.

This approach may seem appealing given the poor conditions that healthcare workers have faced. After all, many hospitals and nursing homes failed to do the bare minimum to protect their employees.²¹⁸ Thousands of healthcare workers have died as a result of this administrative neglect.²¹⁹ Giving healthcare workers flexibility to protect themselves is tempting, especially when their employers and the government have largely failed to do so.

Despite its appeal, such a broad standard would be massively disruptive to patient care. While it would give healthcare workers greater freedom, it would not address the policy concern that led to the inclusion of Section 8(g): that hospitals must be fully staffed.²²⁰ As Congress recognized in 1974, this

217. Even when a collective bargaining agreement does not have an express no-strike provision, courts almost invariably read such a provision into the agreement if it has a grievance-arbitration mechanism. See Anne Marie Lofaso, *Deflategate: What's the Steelworkers Trilogy Got to Do with It?*, 6 BERKELEY J. ENT. & SPORTS L. 48, 70 (2017).

218. See HPAAE, *supra* note 4, at 2.

219. See Ed Yong, 'No One Is Listening to Us,' ATLANTIC (Nov. 13, 2020), <https://www.theatlantic.com/health/archive/2020/11/third-surge-breaking-healthcare-workers/617091/> [<https://perma.cc/LM78-S8KF>].

220. See 120 CONG. REC. 11,147 (1974).

consequence could potentially be disastrous even in normal times.²²¹ During a pandemic, when it is more important that healthcare facilities be fully staffed, it could potentially be catastrophic.

This approach would also require a massive shift in labor law. The proposal to waive Section 8(g), discussed above, would have given healthcare workers substantially the same rights as any other worker under the NLRA. This proposal would go even further and give employees at healthcare facilities more protections than any other workers covered by the Act. Although healthcare workers deserve more legal protections than they currently have, there are valid policy arguments in favor of some restrictions.

G. Expand Section 7 Protections

Finally, a conditional right could be created for unionized healthcare employees to stop work based on Section 7 of the NLRA. In *NLRB v. City Disposal Systems, Inc.*, a single employee's protest was a protected activity because it enforced a provision in his collective bargaining agreement.²²² Under current law, healthcare workers likely would not be able to engage in the same type of activity without violating Section 8(g).

However, a right could be created to exempt workers from Section 8(g) notice requirements if they face dangerous conditions that their employer could reasonably mitigate and if they are acting to enforce a provision of their collective bargaining agreement. If these conditions are met, then unionized employees who stop work without giving notice could be entitled to reinstatement and backpay. This could allow healthcare workers a limited right to engage in protected concerted activity to protect their safety. This right can be effectuated by refusing to perform a specific task, rather than, for example, collectively refusing to report to work. This mirrors the fact patterns in many seminal cases involving workplace safety, including *Whirlpool*,²²³ *City Disposal*,²²⁴ and *Washington Aluminum*,²²⁵ where workers were faced with dangerous conditions and decided on short notice to stop work.

This would effectively allow healthcare workers to protect their safety and put pressure on management while also minimizing disruptions to patient care. A large-scale nurses' strike with no notice in the middle of the pandemic is exactly the type of scenario Section 8(g) was designed to

221. *See id.*

222. 465 U.S. 822, 839 (1984).

223. *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 7 (1980).

224. 465 U.S. at 824.

225. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 10 (1962).

prevent. By comparison, it is much more reasonable for a nurse to refuse to treat a single contagious patient without adequate PPE.

III. ALLOWING HEALTHCARE WORKERS TO PROTECT THEIR SAFETY THROUGH CONCERTED ACTIVITY

The most effective way to enforce workers' rights without sacrificing patient welfare is to expand Section 7. The main goal of such a reform would be to pressure employers to provide adequate protections. A conditional right to refuse work tied to a provision meant to protect collective action is ideal.

This Part discusses the reform itself and its underlying policy goals. It addresses the advantages of tying this to employee action rather than an administrative agency, as well as the advantages of linking it to collective action by organized workers. This Part also touches on the policy basis and mechanisms for linking the right to employer responsibility, as well as the advantages of relying on Section 7 over other statutory provisions.

A. Reconciling Section 7 with the Healthcare Industry

Under the legal framework currently in place, organized employees at healthcare facilities currently have fewer means of protecting their safety than most other workers in different fields.²²⁶ While many workers may not have felt unsafe before 2020, the recent pandemic has shown that healthcare workers can very quickly become very vulnerable as many found themselves risking their lives to treat patients.²²⁷ These safety concerns can best be addressed through a carve out that gives them rights similar to those of workers in other fields.

Case law has established that an individual employee may engage in protected concerted activity, provided that she acts to protect a provision in her collective bargaining agreement.²²⁸ While many other means of refusing to perform dangerous work have not yet been definitively reconciled with Section 8(g) notice provisions, as discussed above, relying on Section 7 specifically could give workers a narrow but useful means of protecting their safety. Such a right would allow unionized healthcare workers to engage in protected concerted activity, even if they act individually.

Workers could avail themselves of this right if unions negotiated for provisions in their collective bargaining agreements stipulating that employers must provide reasonably safe working conditions. Given their

226. *See supra* Part I.

227. *See* HPAAE, *supra* note 4, at 14.

228. *City Disposal Sys., Inc.*, 465 U.S. at 837.

experiences during the pandemic, unions representing workers in the healthcare industry are likely to do so when they next renegotiate their agreements. Such a provision could serve as the foundation of a right to participate in protected concerted activity without giving notice under Section 8(g). Under this proposal, if managers fail to protect workers' safety, as defined either in the collective bargaining agreement or in comparison to industry standards, then workers would be able to refuse to perform work without risking retaliation from their employers. It would essentially exempt provisions which relate to employer's duty to provide a safe workplace from Section 8(g).

As this right would be based on collective bargaining agreements, the exact provision would be negotiated between unions and employers, which would allow both parties to reach a consensus on how to define employer responsibility and which actions do not require ten days' notice under the Act. This would likely be based on industry standards for safety and would limit the provision only to situations similar to the COVID-19 pandemic, which was unprecedented in both its scale and contagiousness. Enforcement would likely be subject to any relevant mechanisms detailed in the contract, such as arbitration. It should ideally be protected by the Board and federal courts of appeals, which are responsible for enforcing labor law.

This proposal would create a relatively narrow right that would nonetheless give workers more flexibility to negotiate with their employers and to protect their safety under dangerous circumstances. It would also fit neatly within existing frameworks for protecting worker safety.²²⁹ This could make the healthcare industry significantly safer without dramatically overhauling existing labor law or unnecessarily risking patient safety.

B. The Importance of Allowing Healthcare Workers to Refuse Hazardous Work

As illustrated by the state of working conditions during the pandemic, providing healthcare workers a right to refuse hazardous work is imperative. While there is a valid public interest in ensuring that sick patients receive care, healthcare workers have recently been forced to choose between risking their lives and keeping their jobs. While they may have agreed to adopt some risk by entering the healthcare field, they have faced unprecedented danger since COVID-19 entered the United States as a result of employer neglect.²³⁰ Many hospitals did not take reasonable measures to protect their employees'

229. See *supra* Section I.A for discussions of Section 502 and Section 7.

230. See Yong, *supra* note 219.

safety.²³¹ Under current legal frameworks, workers have relatively little recourse when hospital management fails them.

The lack of recourse exists partially because healthcare workers' welfare has been seen as coming at the expense of patients. When looking at Section 8(g) in the past, the Board and courts have weighed workers' rights against patient welfare.²³² However, when fighting a contagious disease, these concepts are not opposed but rather closely linked. Workers at healthcare institutions became potential carriers of the virus.²³³ This includes medical staff not only in hospitals but also nursing homes and prisons.²³⁴ When these workers were not given adequate PPE during the first wave, they often spread it from patient to patient, further endangering already at-risk populations.²³⁵ The American Medical Association noted that healthcare providers may have a duty to individual patients, but they "also have a long-recognized public health responsibility," which requires them to "protect their own health to ensure that they remain able to provide care."²³⁶ There are public interest concerns beyond just workers' rights.

Additionally, it is not necessarily true that striking healthcare workers would abandon patients. Studies in the United States, Germany, and the United Kingdom report that most doctors feel they should not be penalized for failing to treat contagious patients but also claim they would risk their own safety to do so.²³⁷ In practice, many striking healthcare workers have continued to treat emergency cases.²³⁸ Notably, during a nurses' strike in Hong Kong held to protest the government's lukewarm attempts to contain the pandemic, many nurses continued to treat COVID-19 patients.²³⁹

231. See HPAAE, *supra* note 4, at 4.

232. See *NLRB v. Special Touch Home Servs., Inc.*, 566 F.3d 292, 300 (2d Cir. 2009).

233. Smith, *supra* note 127.

234. See 29 U.S.C. § 158(g); see also Emily Widra, *As COVID-19 Continues to Spread Rapidly, State Prisons and Local Jails Have Failed to Mitigate the Risk of Infection Behind Bars*, PRISON POL'Y INITIATIVE (Dec. 2, 2020), <https://www.prisonpolicy.org/blog/2020/12/02/jail-and-prison-covid-populations/#:~:text=As%20a%20result%20of%20these,more%20than%20twice%20as%20high> [<https://perma.cc/8SYA-3YZF>]; Jackie Fortier, *Employees Working in Multiple Nursing Homes Can Serve as Significant Drivers of Coronavirus Spread*, CNN (Nov. 2, 2020, 11:45 AM), <https://www.cnn.com/2020/11/02/health/nursing-home-employees-covid-spread-partner/index.html> [<https://perma.cc/L6Z5-78CW>].

235. See HPAAE, *supra* note 4, at 15.

236. *Ethical Use of Quarantine & Isolation*, AM. MED. ASS'N, <https://www.ama-assn.org/delivering-care/ethics/ethical-use-quarantine-isolation> [<https://perma.cc/Y9U2-UA6Q>] (last visited Aug. 15, 2021).

237. See Pelkas & Boisseau, *supra* note 160, at 219.

238. See Tucker, *supra* note 212, at 135 ("[H]ealth care unions covered by [an] unfettered strike model maintained essential health care services during strikes.").

239. See Fung Kei Cheng, *Ethical Dilemma: An Unprecedented Strike by Health Care Workers in Early February 2020 in Hong Kong*, 38 PUB. HEALTH NURSING 473, 475 (2020).

Expanding healthcare workers' right to stop work would not necessarily leave patients without care.

To the extent that there are competing interests in patient's welfare and healthcare workers' safety, they can best be balanced through a conditional right to stop work. As discussed above, Section 8(g) was not arbitrarily added to the NLRA.²⁴⁰ It has an important function in ensuring that patients receive care. However, expanding workers' existing rights to refuse dangerous work to healthcare workers gives them a necessary tool to protect themselves and to pressure their employers to ensure safe working conditions. Making the right to refuse dangerous work conditional would minimize the risk of disruptions to patient care during a public health crisis.

C. Rationale for Employer Responsibility

While a conditional, rather than universal, right is certainly helpful, it is also important to consider what makes it conditional. A conditional right solution would be most effective if it was conditioned on employer fault. Such a requirement would incentivize employers to proactively ensure safety, which is especially useful as management is best positioned to protect safety. During the pandemic's first peak in New York City, medical staff struggled not only with a lack of PPE but also with hospitals' lack of effective PPE management and distribution.²⁴¹

As discussed above, this mechanism could be negotiated in the contract between unions and their employers. Therefore, it would be subject to the contract's provisions around dispute resolution and enforcement from the Board should those measures fail. If an employee refuses to perform work and the employer failed to take reasonable precautions to protect the employee's safety, as defined in the collective bargaining agreement, then the employee should not be fired or subject to discipline.

Under this proposal, the right to refuse unsafe work would be triggered when employers fail to take "reasonable precautions" to protect employees' safety. Thus, it is important to determine how "reasonable precaution" is defined. The exact parameters could be negotiated into a collective bargaining agreement, although, should this issue be adjudicated, it may be held to a common industry standard. For example, hospital staff should reasonably expect management to provide them with properly fit-tested N-95 respirators when they interact with a COVID-19 positive patient.²⁴² Should hospitals or nursing homes fail to take such measures, employees who refuse to work should be shielded from retaliation. This could account

240. *See* 120 CONG. REC. 11,147 (1974).

241. *See* HPAAE, *supra* note 4, at 13.

242. *See id.*

for the anomalous nature of the pandemic, as normal safety precautions would not trigger this right.

A mechanism such as the one described above could have made a significant difference during the pandemic. The media narrative during the pandemic was that PPE simply did not exist. This was not entirely untrue; there was in fact a severe PPE shortage.²⁴³ However, there were still steps that managers could have taken to protect workers. Hospital administrators could have logged which employees tested positive for COVID-19 and shared that information with unions.²⁴⁴ They could have allowed sick employees to remain quarantined for the recommended 14 days before returning to work.²⁴⁵ They could have distributed existing PPE more equitably and effectively.²⁴⁶ Hospitals and nursing homes would have been more likely to take these steps had there been consequences for not doing so. If workers could potentially stop work based on employer fault, hospitals may have been less likely to confiscate workers' PPE, as they did in the early days of the pandemic.

Incentivizing employers to proactively enforce high safety standards is especially important, as managers are better positioned than workers to do so. When the government distributed PPE, the government often sent PPE directly to hospital management.²⁴⁷ There was very little transparency in this process, and some unions had concerns that healthcare institutions were stockpiling PPE without giving it out to front-line workers.²⁴⁸ Giving unions the means to pressure employers would make such mismanagement less likely to happen. It would help to ensure that hospitals and nursing homes are safer for both workers and patients.

D. The Advantages of Worker over Agency Action

The carve out described above would rely on worker-led unions rather than top-down reforms from administrative agencies. While OSHA regulations already have a standard for employer fault, there are also advantages to relying on unions rather than government organizations. Agencies such as OSHA do not always have the resources to effectively enforce their standards even under normal circumstances. They struggled to

243. DHHS SURVEY, *supra* note 125.

244. *Cf. HPAE Violation List*, *supra* note 133 (listing complaints from employees over hazardous conditions resulting from a lack of PPE in the workplace).

245. *See HPAE*, *supra* note 4, at 14.

246. *See id.*

247. *See id.* at 19.

248. *See id.*

perform even basic tasks during the pandemic.²⁴⁹ Unions are better positioned to respond to work emergencies efficiently and to represent workers' needs.

OSHA has an important role in protecting workplace safety, but it has long struggled with underfunding and lack of manpower.²⁵⁰ During the spring and summer of 2020, OSHA stopped sending inspectors to visit workplaces in person and often responded to complaints with letters.²⁵¹ Complaints in tri-state area hospitals only led to citations months after the virus had subsided.²⁵² Attempts to lobby OSHA for a temporary emergency standard failed.²⁵³ The agency was not toothless; after all, citations did eventually come through.²⁵⁴ Yet, it is still less reliable than unions.

Unlike an administrative agency distant from workers' daily concerns, unions are operated by people on the ground. This bottom-up structure allows workers to advocate for their own needs rather than wait for an agency to act. Unions are generally more responsive to immediate needs than OSHA and can act more swiftly.²⁵⁵ Such procedural flexibility is invaluable in situations such as the recent pandemic when the situation changed each day, and many workers very quickly found themselves in danger.²⁵⁶

249. See Jonathan D. Karmel, Opinion, *It's Time for OSHA to Do Its Job*, N.Y. TIMES (June 28, 2020), <https://www.nytimes.com/2020/06/28/opinion/letters/coronavirus-OSHA.html> [<https://perma.cc/MA6Z-3L7H>].

250. See *id.*; *Death on the Job: The Toll of Neglect, 2016*, AFL-CIO (Apr. 28, 2016), <https://aflcio.org/reports/death-job-2016> [<https://perma.cc/FVY7-XXKW>].

251. OSHA did not take firm action against employers during spring of 2020 and only issued sanctions after many hospitals were out of danger. While OSHA did eventually act on the letters, they often did not provide an adequate deterrent when workers most needed protection. See Memorandum from the U.S. Dep't of Lab. on Updated Interim Enforcement Response Plan for Coronavirus Disease 2019 (COVID-19) (May 19, 2020), <https://www.osha.gov/memos/2020-05-19/updated-interim-enforcement-response-plan-coronavirus-disease-2019-covid-19> [<https://perma.cc/BRC6-3G5Z>]; John Mendeloff, Opinion, *OSHA's Role in Combating the COVID-19 Pandemic*, REGUL. REV. (Nov. 2, 2020), <https://www.theregreview.org/2020/11/02/mendeloff-osha-role-combating-covid-19-pandemic/> [<https://perma.cc/WCM4-AHW8>].

252. See HPAE, *supra* note 4, at 15; HPAE *OSHA Citations*, *supra* note 151.

253. See AFL-CIO Press Release, *supra* note 153

254. See HPAE *OSHA Citations*, *supra* note 151.

255. See Brooke E. Lierman, 'To Assure Safe and Healthful Working Conditions': Taking Lessons from Labor Unions to Fulfill OSHA's Promises, 12 LOY. J. PUB. INT. L. 1, 10 (2010).

256. While there are valid criticisms of union management, statistics indicate that unionized healthcare facilities are safer for both workers and patients. See, e.g., Arindrajit Dube, Ethan Kaplan & Owen Thompson, *Nurse Unions and Patient Outcomes* 3 (Inst. for the Study of Lab., Discussion Paper No. 8259, 2014); see Michael Ash & Jean Ann Seago, *The Effect of Registered Nurses' Unions on Heart-Attack Mortality*, 57 INDUS. & LAB. REL. REV. 422, 432-33 (2004); Aaron Sojourner, *Unionized Workers Are More Likely to Assert Their Right to a Safe and Healthy Workplace*, CONVERSATION (Sept. 2, 2020, 10:02 AM), <https://theconversation.com/unionized-workers-are-more-likely-to-assert-their-right-to-a-safe-and-healthy-workplace-144718> [<https://perma.cc/ZW2M-RJBD>].

In addition to the practical advantages of relying on a union rather than OSHA, doing so would be more effective doctrinally. A right based on Section 7 would be more flexible than the relevant OSHA regulation. Regulation 1977.12(b)(2) sets a very high standard for employees to stop unsafe work and strongly encourages workers to use a complaint mechanism that does not reliably work.²⁵⁷ While it has its benefits, this course of action is designed to be a last resort. A collective bargaining right, by contrast, would give workers a voice in determining the contours of their right to refuse certain work, and it would give them the full and immediate backing of their unions should they choose to exercise this right. In practice, it would likely be more effective than Regulation 1977.12(b)(2).

E. Advantages of a Collective over an Individual Right

There are also advantages to linking this right to unions rather than applying it individually to all workers. Under current frameworks, Section 8(g) places more limits on employers who belong to unions than those who do not. While unionized nurses could not refuse voluntary overtime without giving notice,²⁵⁸ courts rarely require Section 8(g) notice of their non-unionized counterparts.²⁵⁹ Workers have a great deal of flexibility to protest even coordinated action so long as they stop short of unionizing.²⁶⁰

There is a logic to this framework. Unionized workers are the most threatening to management and the most likely to cause a large-scale disruption to patient care.²⁶¹ However, during the first wave of the pandemic, this ironically left them with fewer options to protect themselves. Conditionally waiving Section 8(g) could give unions a useful tool when they need to protect both their members and their patients.

It is worth considering that this may be most useful as a means of pressuring employers for better safety precautions rather than a tool to facilitate large-scale strikes. Many workers in the healthcare industry chose to enter that field because they are willing to risk their own safety to help

257. 29 C.F.R. § 1977.12(b)(2) (2021).

258. *See* SEIU, *United Healthcare Workers-W. v. NLRB*, 574 F.3d 1213, 1216 (9th Cir. 2009); *N.Y. St. Nurses Ass'n*, 334 N.L.R.B. 798, 798 (2001).

259. *See, e.g.,* *Montefiore Hosp. & Med. Ctr. v. NLRB*, 621 F.2d 510, 513 (2d Cir. 1980); *NLRB v. Long Beach Youth Ctr., Inc.*, 591 F.2d 1276, 1277 (9th Cir. 1979); *Kapiolani Hosp. v. NLRB*, 581 F.2d 230, 233 (9th Cir. 1978).

260. *See Kapiolani Hosp.*, 581 F.2d at 233 (“Section [8(g)] does not speak of unrepresented individuals nor small groups of unrepresented individuals.”).

261. *See Walker Methodist Residence & Health Care Ctr., Inc.*, 227 N.L.R.B. 1630, 1631 (1977) (stating that Section 8(g) applies only to labor organizations because “[a] brief work stoppage by a few unorganized employees simply was not the type of disruption with which Congress was concerned”).

their patients.²⁶² Even if workers do not use this right to protect themselves, it would give them more leverage against hospital management. If this right is most useful as a bargaining tool, then unions would be better equipped to use it than unrepresented workers.

Logistically, it also makes sense for this right to be tied to collective bargaining agreements. Teamsters' unions have included provisions relating to safety for years, which gave rise to cases like *City Disposal*.²⁶³ After their experiences with COVID-19, unions in the healthcare field may likely begin to do the same when they negotiate new agreements. Doing so would put employers on notice that they must address workplace safety. This would ensure that hospital employees have better working conditions, which is the true goal of this reform, and it would minimize unexpected disruptions should unions organize a work stoppage.

F. Advantages of Section 7 over Section 502

The proposed conditional right to refuse dangerous work is most effective if tied to Section 7 instead of another statutory provision protecting safety. While Section 7 of the NLRB and Section 502 of the LMRA can both be used to protect worker safety, there are also advantages to relying on the former rather than the latter. In addition to working with unions, there are doctrinal concerns with Section 502 that make it comparatively ineffective.

Most significantly, Section 502 does not provide affirmative rights beyond stating that withholding work under certain conditions is not a strike.²⁶⁴ While this could theoretically be reformed to better protect healthcare workers, it provides relatively few protections to any workers.²⁶⁵ It does minimize the risk of engaging in an unprotected strike, but employees who rely on their work for survival may not feel entirely comfortable relying on Section 502 in times of crisis.

Even accounting for that, as discussed in Part II, this standard has not consistently protected workers. In *Yellow Freight*, for example, a safety dispute was subject to arbitration.²⁶⁶ The Board upheld the arbitrator's decision, although it undermined the policy rationale behind Section 502.²⁶⁷ Similarly, the workers in *TNS* achieved only a Pyrrhic victory.²⁶⁸ There,

262. See Smith, *supra* note 127.

263. NLRB v. City Disposal Sys., Inc., 465 U.S. 822, 828 (1984).

264. See *supra* Section I.A.i.

265. See *supra* Section I.A.i.

266. Yellow Freight Sys., Inc., 337 N.L.R.B. 568, 568 (2002).

267. See *id.* at 572.

268. TNS, Inc., 329 N.L.R.B. 602, 611 (1999).

workers spent nearly two decades in litigation and, despite prevailing in court, they ultimately did not receive back pay.²⁶⁹

Additionally, a mechanism based on Section 7 is more likely to withstand administrative shifts. Section 502 also relies on an objective standard, which could be whittled down by an anti-labor Board. The NLRB is somewhat notorious for being politicized²⁷⁰ and, despite being supposedly objective, the “abnormally dangerous” criteria is often determined subjectively by board members.²⁷¹ This makes Section 502 a relatively flimsy shield for workers facing danger.

G. Advantages of Expanding Section 7 Protections

For all the reasons described above, healthcare workers deserve more protection than the law currently affords them. This could be accomplished through a mechanism tied to collective bargaining agreements. Provisions requiring that employers provide reasonably safe working conditions should be exempted from the requirement that healthcare workers provide ten days’ notice before concerted activity. This could allow unions and managers to carve out a narrow but helpful exception to Section 8(g), which would give workers substantially more flexibility when advocating for safer conditions.

Giving employees at healthcare facilities the right to engage in concerted activities during emergencies balances concerns for worker and patient welfare. It would allow unions to pressure employers to provide reasonable safety accommodations in times of emergency without giving workers *carte blanche* to stop work in the middle of a pandemic. Employees could advocate for their safety without undermining their responsibility to care for patients.

CONCLUSION

In April of 2020, one worker asked: “Are we essential or disposable?”²⁷² Many workers deemed “essential” have asked the same question since COVID-19 entered the United States. Even as cities organized nightly rituals to celebrate healthcare workers or dedicated murals to them, many remained

269. See *TNS, Inc. v. NLRB*, 296 F.3d 384 (6th Cir. 2002); *Oil, Chem. & Atomic Workers Int’l Union v. NLRB*, 806 F.2d 269 (D.C.C. 1986).

270. See James Brudney, *Isolated and Politicized: The NLRB’s Uncertain Future*, 26 *COMPAR. LAB. L. & POL’Y. J.* 221, 221–22 (2005).

271. *TNS, Inc.*, 329 NLRB at 602.

272. See Juliana Feliciano Reyes, ‘Are We Essential or Disposable?’ Workers Say They Need to Know More About Positive Cases on the Job, *PHILA. INQUIRER* (Apr. 21, 2020), <https://www.inquirer.com/jobs/labor/coronavirus-essential-employees-tested-positive-20200421.html> [<https://perma.cc/A3YL-XQR6>].

overworked, underpaid, and inadequately protected.²⁷³ Although vaccination rates are high and communities have returned to pre-pandemic life in many regions of the United States, many hospitals are no better prepared for a new pandemic than they were in February 2020.²⁷⁴

These shortages are due in part to administrative error and the logistical difficulties of supplying equipment on short notice.²⁷⁵ However, hospitals' failure to protect their staff comes from a culture of not valuing workers and a legal system that has not updated its national labor laws since 1974. COVID-19 has exposed flaws that have been present but unaddressed for decades. Giving healthcare workers an explicit right to refuse hazardous work would ensure their well-being in the long term, even after the pandemic-era gratitude fades.

273. See Brudney, *supra* note 27, at 3; Brett Shweky, *Nonprofit Hospital Unveils Health Care Heroes Mural*, S. FLA. SUN SENTINEL (Feb. 9, 2021, 3:27 PM), <https://www.sun-sentinel.com/community/riverside-times/fl-cn-holy-cross-health-healthcare-heroes-mural-20210209-4ekcsschc5gctbashpnzpf4hhq-story.html> [https://perma.cc/38RF-5UWJ].

274. See Michelle Murillo, *PPE Shortage Could Become a Challenge in Case of Another Pandemic, Expert Says*, WTOP NEWS (May 23 2021, 9:37 PM), <https://wtop.com/coronavirus/2021/05/ppe-shortage-could-become-a-challenge-in-case-of-another-pandemic-expert-says/> [https://perma.cc/8J8Q-72QS].

275. See Finkenstadt et al., *supra* note 130.