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Under Pressure: Addressing Warehouse Productivity Quotas and the Rise In Workplace Injuries

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UNDER PRESSURE: ADDRESSING WAREHOUSE PRODUCTIVITY QUOTAS AND THE RISE IN WORKPLACE INJURIES

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INTRODUCTION

When the auto parts plant where he had worked for nine years closed down, Darryl Richardson was excited to land a job as a "picker" at an Amazon warehouse.[1] His excitement was short lived. Richardson found that the job required employees to work at a breakneck speed or risk termination.[2] He saw co-workers fired for failing to meet Amazon's productivity quotas, and Richardson himself was expected to pick 315 items per hour.[3] "I thought it would be different," Richardson said.[4] "You ain't got time to look around. You get treated like a number. You don't get treated like a person. They work you like a robot."[5]

Across the country, many companies hire warehouse workers, including "logistics companies" that help retailers like Disney or Verizon deliver their products to consumers.[6] This Note mainly focuses on Amazon, as it employs more than one million people worldwide[7] and exerts huge influence in the warehouse industry.[8]

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1. *See* Steven Greenhouse, *'We Deserve More': An Amazon Warehouse's High-Stakes Union Drive*, GUARDIAN (Feb. 23, 2021, 5:00 AM), https://www.theguardian.com/technology/2021/feb/23/amazon-bessemer-alabama-union [https://perma.cc/GR36-TE2U].

2. *See id.*

3. *See id.*

4. *See id.*

5. *Id.*

6. *See* The Daily, *The Human Toll of Instant Delivery*, N.Y. TIMES, at 3:30 (Nov. 26, 2018), https://www.nytimes.com/2018/11/26/podcasts/the-daily/warehouse-workers-instant-delivery.html [https://perma.cc/HN9N-4KHS] (discussing XPO Logistics).

7. Aimee Picchi, *Amazon Says It Now Has More than 1 Million Employees*, CBS NEWS (Oct. 30, 2020, 2:18 PM), https://www.cbsnews.com/news/amazon-1-million-employees/ [https://perma.cc/K3NF-F86X].

8. *See* BETH GUTELIUS & NIK THEODORE, UC BERKELEY LAB. CTR., THE FUTURE OF WAREHOUSE WORK: TECHNOLOGICAL CHANGE IN THE U.S. LOGISTICS INDUSTRY 45 (2019), https://laborcenter.berkeley.edu/pdf/2019/Future-of-Warehouse-Work.pdf [https://perma.cc/4SUZ-NTSX] ("Amazon's influence in the online retail arena is significant, particularly in the context of the company's promises of increasingly faster delivery."); *see also* ATHENA COAL., PACKAGING PAIN:

While warehouse jobs are not new, Amazon has transformed the industry by subjecting its workers[9] to constant electronic monitoring and demanding productivity quotas,[10] leading to employee injury rates far above the national average.[11]

Amazon monitors its employees with an automated system that instructs them which items to pick and tracks their "time off task," such as using the restroom or pausing to drink water.[12] If too much time is spent off task, the system can automatically issue warnings and fire a worker without any human interaction.[13] Fearing termination for failing to meet their quota, employees work at dangerous speeds that put their health and safety at risk.[14] In 2019, the overall injury rate at Amazon warehouses was 7.7 serious injuries for every 100 employees, nearly double the industry average of four serious injuries for every 100 employees.[15] Amazon's fulfillment center in DuPont, Washington, had the highest 2019 injury rate of any Amazon warehouse in the country: 22 serious injuries per 100 employees,[16]

WORKPLACE INJURIES IN AMAZON'S EMPIRE 6–7 (2019), https://s27147.pcdn.co/wp-content/uploads/NELP-Report-Amazon-Packaging-Pain.pdf [https://perma.cc/Y836-53TC] ("Amazon sets the standard for delivery and fulfillment in the eCommerce industry and it also undeniably sets the standards for employment practices and working conditions in the industry.").

9. When referring to Amazon warehouse workers, this Note uses the terms "workers" and "employees" interchangeably because unlike workers at a company like Uber, Amazon warehouse workers are employees, not independent contractors. *See* Rani Molla, *Why Amazon Pays Warehouse Employees to Tweet About Their Jobs*, VOX (Aug. 8, 2019, 9:30 AM), https://www.vox.com/recode/2019/8/8/20726863/amazon-pays-warehouse-employees-twitter-fc-ambassadors-quillette [https://perma.cc/74KP-NQVY].

10. *See* IRENE TUNG, PAUL SONN & JARED ODESSKY, NAT'L EMP. L. PROJECT, 'JUST CAUSE' JOB PROTECTIONS: BUILDING RACIAL EQUITY AND SHIFTING THE POWER BALANCE BETWEEN WORKERS AND EMPLOYERS 9 (2021), https://s27147.pcdn.co/wp-content/uploads/Just-Cause-Job-Protections-2021.pdf [https://perma.cc/YBS3-CHSG] ("[Amazon] has pioneered and promoted new forms of on-the-job electronic monitoring . . . ."); *see also* Will Evans, *Ruthless Quotas at Amazon Are Maiming Employees*, ATLANTIC (Dec. 5, 2019), https://www.theatlantic.com/technology/archive/2019/11/amazon-warehouse-reports-show-worker-injuries/602530/ [https://perma.cc/BRB2-3K7N] ("Marc Wulfraat, president of the supply-chain and logistics consulting firm MWPVL International, described Amazon as more aggressive than any other industry player in what the company expects from workers.").

11. *See infra* Part I.

12. *See* ATHENA COAL., *supra* note 8, at 5.

13. *See infra* Section II.A.

14. *See infra* Part I.

15. *See* Will Evans, *How Amazon Hid Its Safety Crisis*, REVEAL (Sept. 29, 2020), https://revealnews.org/article/how-amazon-hid-its-safety-crisis/ [https://perma.cc/R65A-MTVB].

16. *Id.*

which was more than five times the industry average.[17] Amazon has created a workplace where employees are forced to work at unsafe speeds that lead to physical harm.

Despite the severity of this problem, the Occupational Safety and Health Administration (OSHA), the federal agency tasked with regulating workplaces and reducing employee injuries, has failed to protect warehouse workers.[18] Between 2014 and 2019, OSHA inspected fewer than one quarter of Amazon warehouses,[19] and the financial penalties it issued have not changed the company's behavior.[20]

Over 25 states in the United States are home to Amazon warehouses.[21] Most states have not yet considered legislation to remedy the novel issue of high employee injury rates in Amazon warehouses, but a few, including California, Massachusetts, and Illinois, have proposed bills that would place restrictions on how warehouse employers can use productivity quotas.[22] This Note recommends that states adopt legislation resembling the Illinois approach, which both prohibits the use of data gathered through electronic monitoring from being the basis for employment decisions and creates an affirmative obligation on employers to have a good reason for firing employees.[23] This Note also advocates for a provision[24] of the California bill mandating that California's Division of Occupational Safety and Health (Cal/OSHA) promulgate standards aimed at reducing injuries among warehouse workers.[25] Such a mandate would create an opportunity for state OSHA agencies to promulgate standards directly targeting warehouse

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17. *Id.*

18. *See* Occupational Safety and Health Act of 1970, Pub. L. 91-596, § 2, 84 Stat. 1590, 1590 (stating that the purpose of the act is to ensure safe working conditions "by encouraging employers and employees in their efforts to reduce the number of occupational safety and health hazards at their places of employment, and . . . by providing for the development and promulgation of occupational safety and health standards); *see also infra* Section II.E.

19. *See* ATHENA COAL., *supra* note 8, at 16.

20. *See infra* Section II.D.iii.

21. *See* Nate Rattner & Annie Palmer, *This Map Shows How Amazon's Warehouses Are Rapidly Expanding Across the Country*, CNBC (Jan. 19, 2020, 9:05 AM), https://www.cnbc.com/2020/01/19/map-of-amazon-warehouses.html [https://perma.cc/BE7H-KQE2].

22. *See infra* Sections III.B–C.

23. *See infra* Section III.C.ii.

24. The State Senate amended the bill and removed this provision. *See infra* Section III.B.

25. *See infra* Section III.B.

worker safety,[26] such as a requirement that workers are allowed a break to stretch once per hour. Of the strategies being considered by state legislatures, these two approaches taken together would be the most effective at restricting Amazon's ability to sustain an unsafe workplace.

Part I of this Note explains the relationship between productivity quotas at Amazon and employee injuries and describes the types of injuries employees typically sustain. Part II examines four factors that have enabled Amazon to continue to enforce productivity quotas without restriction, despite their having led to an increased rate of employee injuries. These factors are the limited regulation of employee surveillance, the lack of employment alternatives for warehouse workers, the ubiquity of at-will employment, and the limitations on OSHA's enforcement capabilities. Part III outlines scholars' recommendations for reforming the Occupational Safety and Health (OSH) Act, including a private right of action for workers and stronger whistleblower protections. Part III also reviews three bills introduced by state legislatures in California, Massachusetts, and Illinois that would provide for greater regulation of productivity quotas in warehouses and the mechanisms used to measure worker productivity. Part IV argues that the Illinois approach, combined with a specific mandate included in the proposed California bill, would afford the best protection to warehouse workers.

I. THE RELATIONSHIP BETWEEN PRODUCTIVITY QUOTAS AND EMPLOYEE INJURIES

This Part traces the relationship between Amazon's productivity quotas and the high rate of employee injuries by describing how employees get injured, the type of injuries commonly sustained, and the lack of appropriate medical care at Amazon facilities.

Employees at Amazon are required to meet assigned productivity quotas, a process known as "mak[ing] rate."[27] Rates can vary, but employees have reported being expected to scan over 300 items per

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26. *See* Assemb. B. 701 § 6726, 2020–2021 Reg. Sess. (Cal. 2021) ("By January 1, 2023, the division shall propose to the standards board for the board's review and adoption a standard that minimizes the risk of musculoskeletal injuries and disorders among employees working in warehouse distribution centers . . . . The standard shall address, among other considerations, the relationship between quotas and risk factors for musculoskeletal injuries and disorders . . . .").

27. *See* Chavie Lieber, *Muslim Amazon Workers Say They Don't Have Enough Time to Pray. Now They're Fighting for Their Rights*, VOX (Dec. 17, 2018, 10:56 AM), https://www.vox.com/the-goods/2018/12/14/18141291/amazon-fulfillment-center-east-africa-workers-minneapolis [https://perma.cc/HZ6Q-EZ3W].

hour.[28] According to a report published by Human Impact Partners and the Warehouse Worker Resource Center, "[e]xactly how Amazon determines work quotas remains unclear to many employees. Workers we spoke with expressed that their quotas seem to be arbitrary, fluctuating without warning based on task, day, and season."[29]

What makes the productivity quota at Amazon warehouses most alarming is its relationship to workplace injuries. According to a report by the Athena Coalition that examined injury logs from 28 Amazon facilities in 16 states, the Total Recordable Injury Rate at the Amazon warehouses in 2018 was 10.76 per 100 full-time equivalent workers, which is three times as high as the injury rates across all private employers — 2.8 recordable injuries per 100 employees.[30] Amazon employees are more likely to be injured at work than police officers, solid waste collectors, lumberjacks, or coal miners.[31]

Over 75% of the injuries recorded in the injury logs examined by the Athena Coalition were musculoskeletal injuries, such as sprains, strains, and tears, with the most commonly injured body parts being workers' backs, shoulders, knees, wrists, ankles, and elbows.[32] These injuries are caused by ergonomic hazards, including forceful exertions, repetitive motions like twisting and bending, and awkward postures.[33] The risk of injury associated with these movements increases considerably with the pace of work.[34] The average injured Amazon worker in the Athena Coalition's sample was forced to miss six and a half weeks of work.[35]

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28. *See* Evans, *supra* note 10; Erika Hayasaki, *Amazon's Great Labor Awakening*, N.Y. TIMES MAG. (2021), https://www.nytimes.com/2021/02/18/magazine/amazon-workers-employees-covid-19.html [https://perma.cc/V3S5-MZ2D].

29. HUM. IMPACT PARTNERS, THE PUBLIC HEALTH CRISIS HIDDEN IN AMAZON WAREHOUSES 4 (2021), https://humanimpact.org/wp-content/uploads/2021/01/The-Public-Health-Crisis-Hidden-In-Amazon-Warehouses-HIP-WWRC-01-21.pdf [https://perma.cc/5SGR-PEP8]; *see also* TUNG ET AL., *supra* note 10, at 7.

30. ATHENA COAL., *supra* note 8, at 8.

31. *See id.*

32. *See id.* at 9.

33. *See id.*

34. *See id.*; *see also* Evans, *supra* note 15 ("According to Kathleen Fagan, a physician who inspected Amazon warehouses in her capacity as a medical officer for the federal Occupational Safety and Health Administration, or OSHA, studies have shown that production rates have a direct impact on injuries.").

35. ATHENA COAL., *supra* note 8.

In 2019, *The Atlantic* interviewed several former Amazon warehouse employees about their workplace injuries.[36] One of those employees was Candace Dixon, who started working at Amazon in April of 2018.[37] Dixon worked at the warehouse in Eastvale, California, an Amazon warehouse with a serious injury rate more than four times the 2018 industry average.[38] After just two months, Dixon could no longer work at the warehouse due to her injuries.[39] An Amazon-approved doctor diagnosed her with a back sprain, joint inflammation, and chronic pain, and determined that her injuries were due to her job.[40] Months after leaving Amazon, Dixon could barely climb stairs, and getting out of a chair or walking her dog was still painful.[41] While Amazon does instruct employees on how to move their bodies and do their jobs safely, workers have complained that they regularly need to break these safety protocols to meet their quotas.[42] *The Atlantic* reported: "They would jump or stretch to reach a top rack instead of using a stepladder. They would twist and bend over to grab boxes instead of taking time to squat and lift with their legs . . . . They had to, they said, or they would lose their jobs."[43]

In addition to ergonomic injuries, employees have also reported getting urinary tract infections because they do not have time to use the restroom.[44] During a ten-hour shift, an employee only has one half-hour break and two 15-minute breaks,[45] and any trips to the restroom outside of these designated breaks count against the time workers have to meet their quotas.[46] Restrooms at Amazon warehouses are often a five-to-six-minute walk from workstations, making a trip to the restroom a hinderance for workers trying to

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36. *See* Evans, *supra* note 10.

37. *Id.*

38. *See id.*; *see also* Mohamed Al Elew & Soo Oh, *What Are Injury Rates Like at Amazon Warehouses?*, REVEAL (Sept. 29, 2020), https://revealnews.org/article/amazon-injury-rates/ [https://perma.cc/W9PH-AVQU] (noting the Eastvale warehouse had a rate of 18.6 serious injuries per 100 workers in 2018. The industry average that year was four serious injuries per 100 workers).

39. *See* Evans, *supra* note 10.

40. *See id.* ("An Amazon-approved doctor said she had bulging discs and diagnosed her with a back sprain, joint inflammation, and chronic pain, determining that her injuries were 100 percent due to her job.").

41. *See id.*

42. *See id.*

43. *Id.*

44. *See id.*

45. *See* ATHENA COAL., *supra* note 8, at 17.

46. *See id.*

make rate.[47] Kristi Shrum, an employee at an Amazon warehouse in Southern California, explained that she got multiple urinary tract infections as a result of not using the restroom at work[48]: "You have to hold your pee or not make your rate. Which one you want to do? I had to make my rate."[49] Adam Kester, an Amazon worker from Phoenix, stated that he and other workers would bring customers' orders into the restroom and scan them there to meet their quotas.[50] Amazon's productivity quotas force workers to choose between their health and keeping their jobs.

While many Amazon warehouses are equipped with an "AmCare" on-site medical facility, these facilities are typically staffed by emergency medical technicians (EMTs) rather than physicians or registered nurses.[51] EMTs are qualified to provide first aid and to determine whether an employee is in need of a hospital visit, but they are not certified to diagnose or treat injuries that require more than first aid.[52] When warehouse workers endure severe muscle or joint pain at work, the EMTs at AmCare frequently apply ice to the injury and offer the employee over-the-counter pain relievers before sending them back to work.[53] While this kind of first-aid care may mask an employee's pain, it does not help workers recover or heal,[54] and sending workers back to work while still injured after working long hours can increase the likelihood that minor injuries will become severe.[55] A 2019 OSHA inspection of Amazon's Robbinsville, New Jersey warehouse found that EMTs were permitted to treat workers for up to 21 days before referring them to an outside doctor and were working outside of their scope of practice.[56] Despite these findings, OSHA did not issue a citation.[57]

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47. *See* HUM. IMPACT PARTNERS, *supra* note 29, at 11.

48. *See* Evans, *supra* note 10.

49. *Id.*

50. *See id.*

51. *See* ATHENA COAL., *supra* note 8, at 9.

52. *See id.*

53. *See id.* at 10.

54. *See id.* at 11 ("Ice and over the counter pain relievers can help in masking pain and in getting workers back at their workstations. But that first aid does nothing to help workers actually recover and heal. Worse, it does nothing to address the hazards that caused the injury.").

55. *See id.* ("When supervisors send workers back to work while still injured, force them to work long hours, and prohibit them from taking days off for weeks at a time, even small injuries can turn into much more severe injuries.").

56. *See* H. Claire Brown, *How Amazon's On-Site Emergency Care Endangers the Warehouse Workers It's Supposed to Protect*, INTERCEPT (Dec. 2, 2019, 6:30 AM),

II. ENABLING FACTORS OF THE HIGH EMPLOYEE INJURY RATES AT AMAZON WAREHOUSES

This Part explains four main factors that allow Amazon to push its employees to the physical brink while facing little to no repercussions. Section II.A describes the limitations on existing legislation regulating employee surveillance, which enable Amazon to constantly monitor its employees electronically.[58] Section II.B explains that many warehouse workers at Amazon have few job alternatives, meaning that they may be unable to leave the job even if it puts them at risk of injury.[59] Section II.C examines the employment at-will system, which permits employers to fire workers for any reason, including failure to meet quotas.[60] Lastly, Section II.D surveys OSHA's restricted enforcement capabilities and unsuccessful efforts to deter warehouse employers from subjecting workers to dangerous working conditions.[61]

A. Unrestricted Employee Surveillance

Amazon uses an automated tracking system to constantly monitor workers.[62] If a worker spends too much time off task or fails to meet his or her quota, the system can automatically generate warning letters and fire the employee.[63] A letter from an attorney representing Amazon noted that employees could be fired without

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https://theintercept.com/2019/12/02/amazon-warehouse-workers-safety-cyber-monday/ [https://perma.cc/BM5C-XU7C].

57. *See id.*; *see also* Letter from Paula Dixon-Roderick, Area Dir., U.S. Dep't of Lab., to Andrew Ming, Senior Reg'l Env't Health & Safety Manager, Amazon Fulfillment Ctr. (Aug. 19, 2019), https://s3.documentcloud.org/documents/6584275/Amazon-Robbinsville-OSHA-Letter-081919.pdf [https://perma.cc/GAA3-NFAP] ("[T]he current OSHA inspection again revealed instances indicating that the EMTs and Athletic Trainers (ATs) at AMCARE are working outside their scope of practice, without proper supervision . . . . OSHA has decided not to issue a citation for these patient care issues at this time . . . .").

58. *See* DANIEL A. HANLEY & SALLY HUBBARD, OPEN MARKETS, EYES EVERYWHERE: AMAZON'S SURVEILLANCE INFRASTRUCTURE AND REVITALIZING WORKER POWER 7 (2020).

59. *See infra* Section II.B.

60. *See infra* Section II.C.

61. *See infra* Section II.D.

62. *See* ATHENA COAL., *supra* note 8, at 5.

63. *See id.* at 17 (citing Colin Lecher, *How Amazon Automatically Tracks and Fires Warehouse Workers for 'Productivity,'* VERGE (Apr. 25, 2019, 12:06 PM), https://www.theverge.com/2019/4/25/18516004/amazon-warehouse-fulfillment-centers-productivity-firing-terminations [https://perma.cc/XW7V-X6XR]).

any human involvement.[64] The letter stated: "Amazon's system tracks the rates of each individual associate's productivity and automatically generates any warnings or terminations regarding quality or productivity without input from supervisors."[65] Parker Knight, a disabled veteran and former Amazon employee at the Troutdale, Oregon warehouse, reported that his quota required him to pick 385 small items or 350 medium items per hour.[66] One week, he was meeting 98.45% of his expected rate, rather than 100%, and as a result, he received a written warning letter.[67] This 1.55% speed shortfall was enough to trigger Amazon's disciplinary system.

Amazon can constantly monitor its employees' productivity and terminate workers based on this productivity data because worker surveillance is largely unregulated.[68] Although there are a small number of federal privacy statutes, they are unhelpful in protecting employees from productivity monitoring. For example, the Electronic Communications Privacy Act[69] (ECPA) prohibits the interception of electronic communication without consent.[70] But there is no interception when an employee uses a company device,[71] such as the Amazon scanners that track warehouse workers. Title II of the ECPA restricts access to stored electronic information without proper authorization.[72] However, the statute does not address situations in which employees are required to submit to electronic monitoring as a prerequisite to employment, thereby authorizing the employer to access electronic information about employees, rendering the ECPA inapplicable.[73] While several states have passed laws to address location tracking of employees, these laws only prohibit such tracking when it is done without the worker's consent or

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64. *See* Colin Lecher, *How Amazon Automatically Tracks and Fires Warehouse Workers for 'Productivity,'* VERGE (Apr. 25, 2019, 12:06 PM), https://www.theverge.com/2019/4/25/18516004/amazon-warehouse-fulfillment-centers-productivity-firing-terminations [https://perma.cc/XW7V-X6XR] (critics have argued that the use of an automated termination process creates an environment where workers are treated like numbers rather than people).

65. *Id.* at 3.

66. *See* Evans, *supra* note 10.

67. *See id.*

68. *See* HANLEY & HUBBARD, *supra* note 58, at 3.

69. 18 U.S.C. §§ 2510–23.

70. *See* Ifeoma Ajunwa, Kate Crawford & Jason Schultz, *Limitless Worker Surveillance*, 105 CALIF. L. REV. 735, 748 (2017).

71. *See id.* at 749.

72. *See id.* at 749–50.

73. *See id.* at 750.

without first providing notice.[74] This type of legislation would not protect Amazon warehouse workers who know about the electronic monitoring and were required to consent to it in order to get hired. Both federal and state law is currently ill-equipped to regulate surveillance of employee productivity.

B. Employees Have Few Job Alternatives

Warehouse workers often have limited job alternatives,[75] which enables Amazon to subject its employees to working conditions that lead to frequent injury. In many of the cities and regions where Amazon warehouses are located, such as Memphis, Tennessee, or the Inland Empire of California,[76] warehouse jobs are one of the few employment opportunities providing a decent wage for someone without a college degree.[77] A report by *The Atlantic* explained that many poor cities are eager for Amazon warehouses to open in their communities; "[f]or many places, the choice is not between Amazon or another, better employer. The choice, instead, is Amazon or nothing."[78] Sheheryar Kaoosji, Executive Director of the Warehouse Worker Resource Center, based in the Inland Empire, explained: "It really does feel like you're going to end up at Amazon and you don't have much of a choice."[79] She added, if not at Amazon, you may "end up at another warehouse that is cuing its standards off of

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74. *See id.* at 758–59. California has made it a misdemeanor to use an electronic tracking device to determine the location of a person without their consent. *See id.* at 758. A Connecticut statute prohibits employers from electronically monitoring employees without prior notice. *See id.* at 758–59.

75. *See infra* notes 76–80 and accompanying text.

76. The Inland Empire is a region in Southern California that encompasses Riverside and San Bernardino counties. *See* Alana Semuels, *What Amazon Does to Poor Cities*, ATLANTIC (Feb. 1, 2018), https://www.theatlantic.com/business/archive/2018/02/amazon-warehouses-poor-cities/552020/ [https://perma.cc/QT9E-FPYN].

77. *See* The Daily, *supra* note 6, at 6:01 ("Because of the rise and the dominance of Amazon and other e-retailers, the landscape and the job opportunities for people without college degrees have vastly changed . . . . [I]f you don't have a college degree and you were looking for a good job . . . a warehouse job is the best job in town."); *see also* Jessica Silver-Greenberg & Natalie Kitroeff, *Miscarrying at Work: The Physical Toll of Pregnancy Discrimination*, N.Y. TIMES (Oct. 21, 2018), https://www.nytimes.com/interactive/2018/10/21/business/pregnancy-discrimination-miscarriages.html [https://perma.cc/XV8T-REXJ] ("On Memphis's east side, [warehouse jobs] are often the highest-paying jobs available for people without college degrees.").

78. Semuels, *supra* note 76.

79. Hayasaki, *supra* note 28.

Amazon."[80] Leaving Amazon to take a better or safer job is simply not an option for many warehouse workers.

In addition to having limited job alternatives, data from several states shows that a significant portion of warehouse employees receive government assistance.[81] For example, in 2017, one in three Amazon workers in Arizona received food stamps or lived with someone who did.[82] In Pennsylvania, one in ten Amazon employees received food stamps, with a similar proportion found in Ohio.[83] Of six states that provided data to the Government Accountability Office, Amazon was among the top ten employers of Medicaid recipients in five of those states.[84]

While Amazon pays its warehouse employees $15 per hour, a rate above the federal minimum wage, data from the Bureau of Labor Statistics revealed that in 68 counties where Amazon has opened warehouse facilities, the average industry compensation slipped by more than 6% during the facility's first two years.[85] For example, "in Robbinsville, New Jersey, warehouse workers made $24 [an] hour on average" before Amazon opened a fulfillment center there.[86] In 2019, after Amazon moved in, the average hourly rate for warehouse workers was $17.50.[87] *The Atlantic* reported a similar phenomenon in California, noting that the jobs that used to occupy the labor market in San Bernardino were unionized and offered good benefits, such as jobs at the Kaiser steel mill, the Santa Fe railroad maintenance yard,

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80. *Id.*; *see also* GUTELIUS & THEODORE, *supra* note 8, at 38 ("While the so-called 'Amazon effect' sometimes is exaggerated, the fact is that Amazon has had considerable impacts both on its direct retail competitors and on the warehousing industry as a whole . . . .").

81. *See* H. Clare Brown, *Despite Now Offering $15 Minimum Wage, Amazon Still a Top Employer of SNAP Recipients in Many States*, COUNTER (Nov. 19, 2020, 12:09 PM), https://thecounter.org/15-minimum-wage-amazon-top-employer-snap-recipients-walmart-mcdonalds/ [https://perma.cc/ZR5D-FSMC]; *see also* Matt Day & Spencer Soper, *Amazon Has Turned a Middle-Class Warehouse Career into a McJob*, BLOOMBERG (Dec. 17, 2020, 5:00 AM), https://www.bloomberg.com/news/features/2020-12-17/amazon-amzn-job-pay-rate-leaves-some-warehouse-employees-homeless [https://perma.cc/TAZ6-WK6G].

82. *See* Dennis Green, *Data from States Shows Thousands of Amazon Employees Are on Food Stamps*, BUS. INSIDER (Aug. 25, 2018, 9:09 AM), https://www.businessinsider.com/amazon-employees-on-food-stamps-2018-8 [https://perma.cc/5GX8-M2D4].

83. *See id.*

84. *See* Brown, *supra* note 81.

85. *See* Day & Soper, *supra* note 81.

86. *Id.*

87. *See id.*

and the Norton Air Force Base.[88] Today, jobs in Amazon warehouses pay less, are not unionized, and require multiple members of a household to work, often more than one job, to make ends meet.[89]

Job mobility is made even more difficult for the 66% of warehouse employees who are people of color,[90] and already face systemic economic disadvantages in the labor market.[91] For example, Black and Latinx employees are more likely than white employees to face an extended period of unemployment after a job separation.[92] In addition, historical and present-day racial inequality in the United States has caused Black and Latinx workers to have fewer household savings to fall back on during periods of unemployment, rendering job termination more severe.[93] Since people of color are already disadvantaged in the labor market, the risks associated with leaving a job are higher than for their white counterparts.

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88. *See* Semuels, *supra* note 76.

89. *See id.*

90. *See* GUTELIUS & THEODORE, *supra* note 8, at 24–25 ("[W]orkers of color make up 66% of warehousing industry workers . . . whereas workers of color are just 37% of the total U.S. labor force.").

91. *See* Christian E. Weller, *African Americans Face Systematic Obstacles to Getting Good Jobs*, CTR. FOR AM. PROGRESS (Dec. 5, 2019, 9:03 AM), https://www.americanprogress.org/issues/economy/reports/2019/12/05/478150/african-americans-face-systematic-obstacles-getting-good-jobs/ [https://perma.cc/F25K-Z84D].

> African American workers still face more hurdles to get a job, never mind a good one, than their white counterparts. They continue to face systematically higher unemployment rates, fewer job opportunities, lower pay, poorer benefits, and greater job instability. These persistent differences reflect systematic barriers to quality jobs, such as outright discrimination against African American workers.

Id.; *see also* Valerie Wilson, *Black Unemployment Is at Least Twice as High as White Unemployment at the National Level and in 14 States and the District of Columbia*, ECON. POL'Y INST. (Apr. 4, 2019), https://www.epi.org/publication/valerie-figures-state-unemployment-by-race/ [https://perma.cc/GM9Z-GEYB] ("In the fourth quarter of 2018, African American workers had the highest unemployment rate nationally, at 6.5 percent, followed by Hispanic (4.5 percent), Asian (3.2 percent) and white workers (3.1 percent).").

92. *See* TUNG ET AL., *supra* note 10, at 4 ("[F]rom 2010 to 2019, the rate of separations for white workers resulting in lack of steady employment for three months or more as a share of total employment was 4.4 percent. For Black workers the rate was 5.8 percent, and for Latinx workers it was 5.3 percent.").

93. *See id.* at II; *see also* Kriston McIntosh et al., *Examining the Black-White Wealth Gap*, BROOKINGS (Feb. 27, 2020), https://www.brookings.edu/blog/up-front/2020/02/27/examining-the-black-white-wealth-gap/ [https://perma.cc/CBY5-FM38].

C. The Ubiquity of At-Will Employment

State law gives employers considerable latitude to terminate employees at will, which makes it significantly easier for Amazon to fire workers for failing to meet productivity quotas. In all U.S. states except Montana, an at-will employment relationship between employers and employees is presumed,[94] meaning that in the absence of an employment agreement stating otherwise, employers can fire employees for any reason or no reason at all.[95] Some notable exceptions to at-will employment are codified in anti-discrimination statutes, which prohibit employers from terminating workers based on protected classes such as race, sex, and ability.[96]

While the at-will doctrine has never been affirmatively adopted in federal legislation, it was established in the nation's jurisprudence in the late nineteenth century.[97] After Congress passed the Thirteenth Amendment, employers looked for new ways to control workers, including formerly enslaved people and bonded immigrant laborers, and many employers threatened workers with termination as a way to exercise control over them.[98] In the years after the end of Reconstruction, industrial employers promoted the at-will doctrine and courts began consistently ruling against the notion that employers needed a reason to fire workers.[99]

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94. *See* Jared Odessky, *A New Moment for Wrongful Discharge Law*, ONLABOR (July 16, 2020), https://onlabor.org/a-new-moment-for-wrongful-discharge-law/ [https://perma.cc/USU2-E5MZ].

95. *See id.*

96. *See* William R. Corbett, *"You're Fired!": The Common Law Should Respond with the Refashioned Tort of Abusive Discharge*, 41 BERKELEY J. EMP. & LAB. L. 63, 77 (2020). In addition, anti-retaliation statutes prohibit employers from firing employees for retaliatory reasons, such as to punish an employee for filing a complaint with a regulatory agency. *Id.* at 77–78.

97. *See* TUNG ET AL., *supra* note 10, at 1.

98. *See id.* at 29. Some formerly enslaved workers were terminated for asking to be paid their wages, and others were fired for attempting to vote. *See id.* Railroad companies lobbied for a new law to make it easier to control their immigrant workforce, but the Reconstruction Congress rejected the bill for being too similar to earlier forms of servitude. *See id.* at 30.

99. *See id.* at 1 (citing Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65, 65–86 (2000)). In 1877, a New York-based railroad attorney named Horace Wood published a treatise in which he argued for at-will employment. Wood asserted that since workers had a "right to quit" without penalty, given the recent ban on slavery and servitude, employers should also have the right to fire workers at any time for any reason. In the years after Wood's treatise was published, state and federal courts began to rely on Wood's rationale to reject the notion that employers needed cause to fire workers. *Id.* at 30.

While most scholars criticize at-will employment, there is a minority who defend it, often relying on freedom of contract as a justification.[100] One of the most well-known defenders of the at-will rule is Richard Epstein,[101] who argued that freedom of contract is "an end in itself,"[102] and limitations on this freedom restrict the power of workers and employees to come to mutually beneficial arrangements.[103] Addressing concerns about coercive employers, Epstein noted that the ability of an employee to quit at any time would minimize employer misbehavior since workers would just quit if the burdens of the job outweighed its benefits.[104] Epstein asserted: "It is hardly plausible that contracts at will could be so pervasive in all businesses and at all levels if they did not serve the interests of employees as well as employers."[105] Other scholars have argued more broadly that an employment at-will system provides employers with an incentive to hire more workers in times of growth, knowing that employees can be fired easily at any time.[106]

Critics of employment at-will point out that employers and employees often possess unequal bargaining power, which undermines the assumption that workers can simply quit if they are being treated poorly by their employer.[107] If already vulnerable workers know that employers have enormous discretion to terminate them for almost any reason, they will fear asking for higher wages or

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100. *See* Jonathan Fineman, *The Vulnerable Subject at Work: A New Perspective on the Employment At-Will Debate*, 43 SW. L. REV. 275, 280 (2013).

101. *Id.*; *see also* Richard Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984).

102. *See* Epstein, *supra* note 101, at 953.

103. *See id.* at 954.

104. *See id.* at 966–67.

105. *Id.* at 955.

106. *See* Larry A. Dimatteo, Robert C. Bird & Jason A. Colquitt, *Justice, Employment, and the Psychological Contract*, 90 OR. L. REV. 449, 459 (2011) (highlighting benefits to employment at-will, such as the flexibility that employers have to make rapid shifts to staffing in times of economic decline or expansion).

107. *See* Daniel J. Libenson, *Leasing Human Capital: Toward A New Foundation for Employment Termination Law*, 27 BERKELEY J. EMP. & LAB. L. 111, 123 (2006) ("A steady stream of criticism has flowed from the legal academy . . . . The precise nature of the criticism varies, but an important common denominator is that the at-will rule essentially gives employers an unchecked right to impose devastating economic and personal harms on undeserving individuals."); *see also* Frank J. Cavico, *Employment at Will and Public Policy*, 25 AKRON L. REV. 497, 502 (1991) ("Given the considerable disparity in economic power and bargaining positions between employers and employees, particularly large corporate employers, and the employer's chiefly unchecked control over the terms and conditions of the employment relation, abuses in the treatment of employees naturally arise.").

better working conditions.[108] A survey conducted in Illinois evaluating the impacts of at-will employment revealed that 68% of over 800 workers interviewed reported that they or a co-worker worked when sick or injured to avoid being fired.[109]

To combat this type of dynamic, virtually all union agreements require that employees can only be terminated for good reason, often known as "just cause" rules.[110] Such rules, which require that employers demonstrate good-faith and job-related reasons when firing employees, help to balance the employer-employee relationship and empower workers to oppose dangerous working conditions without fear.[111]

Amazon does not have any warehouses in Montana,[112] and therefore only operates in states where at-will employment is presumed. In addition, the company has aggressively and to date, successfully, fought attempts to unionize its warehouse employees.[113]

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108. *See* SHARON BLOCK & BENJAMIN SACHS, CLEAN SLATE FOR WORKER POWER, CLEAN SLATE FOR WORKER POWER: BUILDING A JUST ECONOMY AND DEMOCRACY 47 (2019) ("When employees know that they can be discharged at will — for nearly any reason at all — they rightly come to fear displeasing their employer. Indeed, in an at-will regime, workers learn that displeasing their employer can mean the end of their ability to support themselves and their families.").

109. *See* TUNG ET AL., *supra* note 10, at 5 (citing UGO OKERE ET AL., NAT'L EMP. L. PROJECT, SECURE JOBS, SAFE WORKPLACES, AND STABLE COMMUNITIES: ENDING AT-WILL EMPLOYMENT IN ILLINOIS (2021)).

110. *See* M. PATRICIA SMITH, NAT'L EMP. L. PROJECT, IN SUPPORT OF INT. 1396 & INT. 1415 EXTENDING "JUST CAUSE" EMPLOYMENT PROTECTIONS TO NEW YORK'S FAST FOOD WORKERS 2 (2020), https://s27147.pcdn.co/wp-content/uploads/2020-2-13-NELP-Testimony-of-Patricia-Smith-re-NYC-Just-Cause.pdf [https://perma.cc/KZA9-BB44].

111. *See* BLOCK & SACHS, *supra* note 108 (explaining that just cause rules would help rebalance the power dynamic between employers and employees).

112. *See* Nate Rattner & Amy Palmer, *This Map Shows How Amazon's Warehouses Are Rapidly Expanding Across the Country*, CNBC (Jan. 19, 2020, 9:05 AM), https://www.cnbc.com/2020/01/19/map-of-amazon-warehouses.html [https://perma.cc/JTR6-SYXD] (showing a map indicating there are no Amazon warehouses in Montana).

113. While there were recent efforts to unionize an Amazon warehouse in Bessemer, Alabama, when it was put to an official vote, the majority of employees voted against joining the Retail, Wholesale and Department Store Union. *See* Alina Selyukh, *It's a No: Amazon Warehouse Workers Vote Against Unionizing in Historic Election*, NPR (Apr. 9, 2021, 1:28 PM), https://www.npr.org/2021/04/09/982139494/its-a-no-amazon-warehouse-workers-vote-against-unionizing-in-historic-election [https://perma.cc/R72D-4XRL]. Amazon used various tactics to try to convince workers to vote against unionization, including holding lengthy "information sessions" that explained to employees why unions were unnecessary, as well as covering the warehouse in fliers with the message, "Do it without dues." *Id.* During the voting period, employees reported being asked by supervisors multiple times whether they had voted yet. *See* Alina Selyukh, *High*

As a result, it is legal for Amazon to fire any of its warehouse workers for failing to make rate.

D. OSHA's Limited Enforcement Capabilities

OSHA has failed to deter Amazon's behavior or provide warehouse workers with proper protections, which further enables the company to use productivity quotas that lead to widespread employee injury.[114] To understand the reasons for OSHA's failure, it is useful to examine the history of the agency and its enforcement shortcomings, as well as its prior attempts to reduce ergonomic injuries in the workplace.

i. Occupational Safety and Health Act: A Primer

In 1970, Congress passed the OSH Act in order to ensure "safe and healthful working conditions for working men and women."[115] With the passage of the OSH Act, Congress created OSHA, a regulatory agency with the authority to set and enforce protective workplace safety and health standards.[116] The agency covers most private sector employers and workers in all 50 states,[117] either directly or through OSHA-approved state plans.[118] State OSHA plans are required to be at least as effective as federal OSHA plans in protecting workers and preventing workplace injuries, and can be more expansive, such as by covering state and local government employers, rather than just private sector employers.[119]

Stakes at a Warehouse: Amazon Fights Against Alabama Union Drive, NPR (Mar. 12, 2021, 1:02 PM), https://www.npr.org/2021/03/12/976141488/high-stakes-at-a-warehouse-amazon-fights-against-alabama-union-drive [https://perma.cc/42EP-5WC5].

114. *See infra* Section II.D.iii.

115. Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590.

116. *See* OCCUPATIONAL SAFETY & HEALTH ADMIN., OSHA 3439-B-12R, OSHA AT-A-GLANCE (2014) [hereinafter OSHA AT-A-GLANCE], https://www.osha.gov/sites/default/files/publications/3439at-a-glance.pdf [https://perma.cc/9DDH-QTAM]. OSHA is part of the United States Department of Labor. *See About OSHA*, OCCUPATIONAL SAFETY & HEALTH ADMIN., https://www.osha.gov/aboutosha [https://perma.cc/94ET-M4ZC] (last visited Nov. 2, 2021).

117. *See* OSHA AT-A-GLANCE, *supra* note 116.

118. OSHA-approved state plans are workplace safety and health programs operated by individual states. *State Plans*, OCCUPATIONAL SAFETY & HEALTH ADMIN., https://www.osha.gov/stateplans [https://perma.cc/EB4G-73QK] (last visited Nov. 2, 2021). OSHA also covers employers and workers in Washington D.C. *See id.*

119. *See id.*

Employers are required to follow OSHA standards,[120] which cover a range of workplace hazards ranging from toxic chemicals to excessive noise levels and unsanitary conditions.[121] The OSH Act also has a General Duty clause, which states that every employer "shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."[122] The General Duty clause can encompass hazards that are not covered by particular OSHA standards or rules.[123]

To enforce its standards, OSHA conducts on-site workplace inspections, usually in response to complaints filed by current employees.[124] When an inspector finds a violation of an OSHA standard, the agency can issue citations and fines, which instruct the employer on how to cure the violation and a deadline for doing so.[125]

ii. OSHA's Attempt to Regulate Ergonomic Hazards

In 2000, OSHA attempted to implement standards aimed at reducing musculoskeletal injuries, which are the most common recorded injuries at Amazon warehouses.[126] OSHA promulgated an ergonomics regulation in order "to reduce the number and severity of [musculoskeletal disorders] caused by exposure to risk factors in the workplace."[127] Among other things, the regulation would have required employers to provide employees with basic information about ergonomic injuries and musculoskeletal disorders (MSDs) and implement "feasible" controls to reduce MSD hazards if certain triggers were met.[128]

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120. *See* OSHA AT-A-GLANCE, *supra* note 116.

121. *See Summary of the Occupational Safety and Health Act*, EPA, https://www.epa.gov/laws-regulations/summary-occupational-safety-and-health-act [https://perma.cc/V58W-KBAC] (last visited Nov. 2, 2021).

122. Occupational Safety and Health Act, 29 U.S.C. § 654(a)(1).

123. *See Using OSHA's General Duty Clause*, NAT'L COUNCIL FOR OCCUPATIONAL SAFETY & HEALTH, https://www.coshnetwork.org/node/353 [https://perma.cc/2HTF-ADC2] (last visited Nov. 2, 2021).

124. *See* OSHA AT-A-GLANCE, *supra* note 116.

125. *See id.*

126. *See* ATHENA COAL., *supra* note 8, at 9; *see also supra* Part I.

127. 29 C.F.R. § 1910 (2000).

128. *See* Adam M. Finkel & Jason W. Sullivan, *A Cost-Benefit Interpretation of the "Substantially Similar" Hurdle in the Congressional Review Act: Can OSHA Ever Utter the E-Word (Ergonomics) Again?*, 63 ADMIN. L. REV. 707, 120 (2011). Such controls can include making tools and equipment adjustable and keeping such items within reach, and reducing the need for prolonged or extreme muscle force and

OSHA published the final rule in the *Federal Register* during the lame-duck period of the Clinton Administration.[129] The rule was met with robust opposition from both Republicans and pro-business lobby groups.[130] Business groups were particularly concerned about the cost of complying with the new regulation, leading the National Association of Manufacturers and the U.S. Chamber of Commerce to challenge the regulation in separate lawsuits.[131] In the final rule, OSHA estimated that compliance with the regulation would cost employers $4.5 billion but would save employers $9.1 billion by preventing about 4.6 million work-related MSDs over the next ten years.[132] Democrats who were supportive of the rule pointed to scientific evidence, including reports by the National Academy of Sciences and the Institute of Medicine, describing the astronomical costs of work-related ergonomic injuries.[133]

The 107th Congress was able to prevent OSHA's ergonomic rule from going into effect through a set of procedures laid out in the Congressional Review Act (CRA) that permit Congress to overturn a rule issued by a federal agency.[134] Congress issued a joint resolution of disapproval of OSHA's ergonomic rule, and President Bush signed

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highly repetitive movements. *See* Michael Silverstein, *Ergonomics and Regulatory Politics: The Washington State Case*, 50 AM. J. INDUS. MED. 391, 393 (2007).

129. *See* Finkel & Sullivan, *supra* note 128, at 120. "When Congress is in session after a November election, and before the beginning of the new Congress, it is known as a 'lame-duck session.'" *Lame Duck Sessions (1940–Present)*, U.S. SENATE, https://www.senate.gov/legislative/LameDuckSessions.htm [https://perma.cc/ZE23-8LP2] (last visited Sept. 19, 2021).

130. *See* Finkel & Sullivan, *supra* note 128, at 120.

131. *See* Kent Hoover, *Two Business Groups File Lawsuits Challenging OSHA Ergonomics Rule*, HOUS. BUS. J. (Nov. 19, 2000), https://www.bizjournals.com/houston/stories/2000/11/20/story6.html [https://perma.cc/7YST-8E3J].

132. *See* 29 C.F.R. § 1910 (2000).

133. *See* Finkel & Sullivan, *supra* note 128, at 121.

134. *See* MAEVE P. CAREY & CHRISTOPHER M. DAVIS, CONG. RSCH. SERV., R43992, THE CONGRESSIONAL REVIEW ACT (CRA): FREQUENTLY ASKED QUESTIONS 1 (2020). Pursuant to the CRA, agencies are required to report on their rulemaking to Congress after which members of Congress have a 60-day period to submit and act on a joint resolution of disapproval. *Id.* at 15. If both houses pass the resolution and the President signs it, the rule will not take effect, and the agency may not issue a rule in "substantially the same form" as the disapproved rule, unless it is specifically authorized by a subsequent law. *Id.* at 1. There has been very little case law interpreting the meaning of "substantially the same form" because the CRA also prohibits judicial review of any "determination, finding, action, or omission under" the CRA. Michael J. Cole, *Interpreting the Congressional Review Act: Why the Courts Should Assert Judicial Review, Narrowly Construe "Substantially the Same," and Decline to Defer to Agencies Under* Chevron, 70 ADMIN. L. REV. 53, 66 (2018).

the resolution into law.[135] Pursuant to the CRA, this action prevented the rule from taking effect *and* prohibited OSHA from issuing a rule in "substantially the same form."[136] OSHA has not since attempted to issue an ergonomic rule, but it has developed industry-specific guidelines for minimizing ergonomic injuries, although such guidance is not legally binding.[137] While OSHA can still cite employers for ergonomic hazards under the General Duty Clause,[138] it rarely does so.[139]

iii. OSHA's Limited Capacity and Ineffectual Penalties

A lack of regulatory tools is not the only impediment preventing OSHA from reducing warehouse worker injuries. The agency has proven ineffective at enforcing its own standards, and such weak enforcement has been the norm for decades.[140]

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135. *See* Finkel & Sullivan, *supra* note 128, at 122.

136. *Id.* at 101.

137. *See id.* at 122 ("OSHA has never since made any attempt to regulate in this area, although it has issued four sets of voluntary ergonomics guidelines — for nursing homes, retail grocery stores, poultry processing, and the shipbuilding industry."); *Ergonomics, Standards and Enforcement*, OCCUPATIONAL SAFETY & HEALTH ADMIN. [hereinafter *Ergonomics*], https://www.osha.gov/ergonomics/faqs [https://perma.cc/N2PT-TCY8] (last visited June 12, 2021) ("OSHA has developed industry specific guidelines to provide specific and helpful guidance for abatement to assist employees and employers in minimizing injuries.").

138. *See id.*

139. *See* Finkel & Sullivan, *supra* note 128, at 122.

> Even without a specific standard, OSHA could use its General Duty Authority to issue citations for ergonomic hazards that it can show are likely to cause serious physical harm, are recognized as such by a reasonable employer, and can be feasibly abated. However, in the more than ten years after the congressional veto of the ergonomics rule, OSHA issued fewer than one hundred such citations nationwide. For purposes of comparison, in an average year, federal and state OSHA plans collectively issue more than 210,000 violations of all kinds nationwide.

Id. One instance in which OSHA issued fines for ergonomic hazards under the General Duty clause occurred in 2015 and involved the supermarket chain, Hannaford Supermarkets. OSHA cited Hannaford for failing to keep two of its locations free from recognized hazards likely to cause MSDs. The company ultimately settled with the agency, agreeing to pay $9,750 in fines and make several changes to better protect employees. *See* Press Release, Occupational Safety & Health Admin., Hannaford Supermarkets Acts to Prevent Musculoskeletal Injuries for Warehouse Employees in Maine and New York (Aug. 19, 2015), https://www.osha.gov/news/newsreleases/region1/08192015 [https://perma.cc/J5L9-D88E]. But as mentioned above, this case was the exception, not the rule.

140. *See* Press Release, Ctr. for Progressive Reform, New Report: COVID-19, OSHA's Lackluster Enforcement History Highlight Need for Worker Empowerment (July 29, 2020), http://progressivereform.org/our-work/workers-rights/osha-50-nr-072920/ [https://perma.cc/DKM2-4KYL] ("While the Trump administration's ongoing

OSHA's enforcement efforts were particularly weak under the Trump Administration compared to previous years. According to OSHA's own data, the agency conducted an average of 32,610 worksite inspections per year during the first three years of the Trump Administration, which was down from an average of 38,092 inspections per year under the Obama Administration.[141] In addition, a 2020 report by the National Employment Law Project revealed that as of January 2020, OSHA had "the lowest number of on-board inspectors in the last 45 years."[142] "At this staffing level, it would take the agency a whopping 165 years to inspect each workplace under its jurisdiction just once."[143]

In addition to being understaffed, the financial penalties OSHA issues for violations tend to be very small, making enforcement both unlikely and inconsequential.[144] The current maximum penalty for a serious OSHA violation is $13,653, while the maximum for a willful and repeat violation is $136,532.[145] A violation is deemed "serious" when "it poses a substantial probability of death or serious physical harm to workers."[146] Even when OSHA does find a serious violation, it rarely imposes the maximum penalty. In fiscal year 2019, the average penalty for a serious violation was only $3,717.[147] According to a 2019 report authored by a coalition of non-profit and labor organizations, OSHA inspectors issued 67 citations at Amazon warehouses between 2015 and 2019, resulting in fines of $262,132,

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assault on our safeguards has worsened these problems and the shortcomings of the Occupational Safety and Health Administration (OSHA), the agency's lackluster enforcement efforts and failure to protect whistleblowers stretches back decades.").

141. *See* DEBORAH BERKOWITZ, NAT'L EMP. L. PROJECT, WORKER SAFETY IN CRISIS: THE COST OF A WEAKENED OSHA 4 (2020), https://s27147.pcdn.co/wp-content/uploads/Worker-Safety-Crisis-Cost-Weakened-OSHA.pdf [https://perma.cc/7TAU-BMH6].

142. *Id.* at 2.

143. *Id.*

144. *See* AM. FED'N OF LAB. & CONG. OF INDUS. ORGS., DEATH ON THE JOB: THE TOLL OF NEGLECT 18 (2016) [hereinafter 2016 DEATH ON THE JOB], https://aflcio.org/sites/default/files/2020-10/DOTJ2020_Final_100620_nb.pdf [https://perma.cc/E3QC-G9P9] ("A combination of too few OSHA inspectors and low penalties makes the threat of an OSHA inspection hollow for too many employers.").

145. *See OSHA Penalties (2021)*, OCCUPATIONAL SAFETY & HEALTH ADMIN., https://www.osha.gov/penalties [https://perma.cc/5WZA-TLBU]. This is up from a maximum penalty of $13,494 in 2020. *See* AM. FED'N OF LAB. & CONG. OF INDUS. ORGS., DEATH ON THE JOB: THE TOLL OF NEGLECT 19 (2020) [hereinafter 2020 DEATH ON THE JOB].

146. 2016 DEATH ON THE JOB, *supra* note 144, at 20.

147. *See* 2020 DEATH ON THE JOB, *supra* note 145, at 19.

which represents roughly 0.0087% of Amazon's profits in 2018 alone.[148] The infrequency of inspections and the low financial penalties for violations has made the threat of OSHA enforcement unable to deter many employers from wrongful behavior.[149]

Amazon has thus been able to sustain a work environment that puts its employees at risk of serious injury because of the limited regulation of employee surveillance, the lack of employment alternatives for warehouse workers, the ubiquity of at-will employment, and the limitations on OSHA's enforcement capabilities.

III. HOW TO STOP THE CLOCK: LEGISLATIVE AND REGULATORY EFFORTS TO REDUCE WAREHOUSE WORKER INJURIES

A. Reform the OSH Act

A straightforward way to reduce employee injury rates in warehouses would be for OSHA to set a standard aimed at restricting productivity quotas and protecting warehouse workers. There is no indication that OSHA is considering such standards.[150] In addition, given OSHA's limited capacity, effective enforcement would be unlikely.[151] To remedy this, Congress could enact specific reforms to strengthen the OSH Act and provide workers with greater protections.

i. Private Right of Action

Several scholars and practitioners have discussed the need for a private right of action under the OSH Act[152] in order to enable

148. *See* ATHENA COAL., *supra* note 8, at 15.

149. *See* 2016 DEATH ON THE JOB, *supra* note 144, at 18.

150. *See Agency Rule List — Spring 2021*, OFF. INFO. & REGUL. AFFS., https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST&currentPub=true&agencyCode=&showStage=active&agencyCd=1200&Image58_x=38&Image58_y=14&Image58=Submit [https://perma.cc/U5AU-D5W8] (last visited June 13, 2021).

151. *See supra* Section II.D.iii.

152. *See generally* CTR. FOR PROGRESSIVE REFORM, OSHA'S NEXT 50 YEARS: LEGISLATING A PRIVATE RIGHT OF ACTION TO EMPOWER WORKERS 5 (2020), https://cpr-assets.s3.amazonaws.com/documents/OSHA-Private-Right-of-Action-FINAL.pdf [https://perma.cc/EN3X-WB5T]. *See also* NAT'L COUNCIL FOR OCCUPATIONAL SAFETY & HEALTH, NATIONAL AGENDA FOR WORKER SAFETY AND HEALTH 4 (2021), https://nationalcosh.org/sites/default/files/2021-02%20National%20Agenda%20for%20Worker%20Safety%20and%20Health.pdf [https://perma.cc/M22W-VES8]. In this report, the National Council for Occupational Safety and Health (COSH) called on the Biden Administration to support a version

workers to file suit when an employer violates an OSHA standard and the agency decides not to inspect or issue a citation.[153] At present, only OSHA has the right to pursue a claim under the OSH Act, rather than individuals.[154] There are several statutes at the federal and state level that provide for private rights of action and could serve as models, such as the Clean Air Act[155] and the Clean Water Act,[156] as well as the California Private Attorney General's Act.[157] Typically, when a plaintiff is successful in a citizen suit, the remedy is either an injunction requiring the losing party to stop the violating action, or civil penalties obliging the violating party to pay a fine to the U.S. Treasury.[158] A private right of action under the OSH Act would provide workers with recourse if OSHA decided not to respond to a violation and could have a deterrent effect on employers and motivate them to comply with OSHA standards.[159]

In order for workers to take full advantage of a private right of action, they would need to retain attorneys, something that may be financially infeasible for many Amazon warehouse workers.[160] In

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of the Protecting America's Workers Act (PAWA) that would incorporate a private right of action into the OSH Act. *See id.* at 2. On February 7, 2021, Congressman Joe Courtney introduced House Resolution 1074, a version of PAWA that does not include a private right of action for employees. *See* Courtney M. Malveaux & Catherine A. Cano, *Push to Give Workers Right to Sue Employers for Occupational Safety and Health Act Violations*, JACKSON LEWIS (Feb. 16, 2021), https://www.jacksonlewis.com/publication/push-give-workers-right-sue-employers-occupational-safety-and-health-act-violations [https://perma.cc/8WVP-3G8V].

153. *See* CTR. FOR PROGRESSIVE REFORM, *supra* note 152, at 7.

154. *See* Malveaux & Cano, *supra* note 152.

155. *See* 42 U.S.C. § 7604.

156. *See* 33 U.S.C. § 1365.

157. *See* CAL. LAB. CODE § 2699 (Deering 2021); *see also* CTR. FOR PROGRESSIVE REFORM, *supra* note 152, at 7.

158. *See* CTR. FOR PROGRESSIVE REFORM, *supra* note 152, at 23. Some scholars have argued that a successful plaintiff in a citizen suit should be able to recover civil penalties. *Id.* Scholars have also argued that a private right of action under the OSH Act should require the penalty to be paid to OSHA, rather than the U.S. Treasury. *Id.* Under the California Private Attorney General's Act, the agency receives 75% of the civil penalty, while the aggrieved employee recovers 25%. *Id.* at 24.

159. "[A] review of private citizen suits filed under the California [Private Attorney General Act] found that these cases 'had a considerable and positive impact for workers by deterring violations through a relatively small number of high-impact suits.'" *Id.* at 32 (citing RACHEL DEUTSCH, REY FUENTES & TIA KOONSE, UCLA LAB. CTR., CALIFORNIA'S HERO LABOR LAW: THE PRIVATE ATTORNEYS GENERAL ACT FIGHTS WAGE THEFT AND RECOVERS MILLIONS FROM LAWBREAKING CORPORATIONS 6 (2020), https://populardemocracy.org/sites/default/files/PAGA%20Report_WEB.pdf [https://perma.cc/3J5R-FE92]).

160. *See supra* Section II.B.

addition, attorneys are unlikely to take a case if there is no guarantee of recovery of their costs, particularly in cases that require a significant time investment.[161] For this reason, the Center for Progressive Reform has argued that a private right of action under the OSH Act should include a provision awarding reasonable attorney's fees to individuals or organizations that initiate successful cases, including for those cases that settle.[162] The Fair Labor Standards Act[163] (FLSA) is a useful model for structuring an attorney's fees provision under a private right of action. Under the FLSA, a successful plaintiff recovers reasonable attorney's fees from the defendant, calculated using the "Lodestar method,"[164] in which fees are based on the number of hours reasonably spent by the attorney, multiplied by an hourly rate that is determined by the prevailing market rate for attorneys providing similar services in the jurisdiction.[165] An attorney's fees provision could make it more financially feasible for wronged employees to pursue a suit.[166]

ii. Greater Whistleblower Protections

The OSH Act prohibits employers from discharging or discriminating against an employee because he or she filed a complaint with OSHA.[167] The Act also authorizes OSHA to investigate complaints and bring an action in federal court in the event that an employee is discriminated against for contacting OSHA.[168] Despite these provisions, OSHA has a poor record of enforcing whistleblower claims, as shown by scholars such as David Kwok.[169] Kwok noted that in fiscal year 2009, OSHA received 1,280

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161. *See* CTR. FOR PROGRESSIVE REFORM, *supra* note 152, at 24.

162. *See id.*

163. *See* 29 U.S.C. § 216(b).

164. CTR. FOR PROGRESSIVE REFORM, *supra* note 152, at 25.

165. *See id.* ("Regardless of the amount of wages recovered, which in an individual case may be low relative to the attorney's fees, the recovery amount does not reduce the attorney's fees owed to the prevailing party. Thus, it is possible for attorney's fees to be upwards of $100,000 for the recovery of $5,000 in wages.").

166. *See id.*

167. *See* 29 U.S.C. § 660(c)(1).

168. *See id.* § 660(c)(2) ("If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall bring an action in any appropriate United States district court against such person . . . . [T]he United States district courts shall have jurisdiction . . . to restrain violations of paragraph (1) of this subsection and order all appropriate relief including rehiring or reinstatement of the employee to his former position with back pay.").

169. *See generally* David Kwok, *The Public Wrong of Whistleblower Retaliation*, 96 HASTINGS L.J. 1225 (2018).

retaliation complaints but OSHA investigators only recommended litigation in 15 cases.[170] While it is difficult to determine whether the lack of enforcement was justified without a third-party analysis of the merits of the 1,280 cases, recommending 15 out of 1,280, a rate of just over 1%, suggests that OSHA does not prioritize the enforcement of whistleblower retaliation claims.[171] More recently, the National Employment Law Project analyzed OSHA's public data on employee retaliation complaints from the beginning of the COVID-19 pandemic through August 9, 2020.[172] Of the 1,744 complaints filed, only 348 complaints were docketed for investigation, and only 35 were resolved during that period.[173] Most of the complaints, 54%, were dismissed or closed without investigation.[174]

Even if one assumes that the low rates of success are justified because most retaliation claims are meritless, such statistics could have the effect of discouraging individuals with valid claims from pursuing them.[175] This is particularly concerning because many warehouse workers have limited employment alternatives,[176] and therefore may already be hesitant to file an OSHA complaint for fear of losing their job. This issue is further exacerbated if workers know that OSHA will not protect them from employer retaliation.

The Center for Progressive Reform has highlighted specific shortcomings of the OSH Act's whistleblower provision that could be reformed to make it easier for workers to file retaliation claims and provide them with more robust protection. For example, one shortcoming is that employees only have 30 days to file a retaliation complaint with OSHA.[177] A 30-day statute of limitations is an insufficient amount of time to determine that one's employer acted

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170. *Id.* at 1250.

171. *Id.* ("[T]he low litigation enforcement rate may suggest that OSHA is not heavily invested in public litigation of whistleblower retaliation cases.").

172. *See* Deborah Berkowitz & Shayla Thompson, *OSHA Must Protect Covid Whistleblowers Who File Retaliation Complaints*, NAT'L EMP. L. PROJECT (Oct. 8, 2020), https://www.nelp.org/publication/osha-failed-protect-whistleblowers-filed-covid-retaliation-complaints/ [https://perma.cc/ZL92-QXTA].

173. *Id.* ("Resolving a mere two percent of OSHA retaliation complaints in six months is a dismal record under any circumstances. It undermines workers' confidence that they'll be protected when reporting unsafe working conditions. But it is especially egregious during a pandemic . . . .").

174. *Id.*

175. *See* Kwok, *supra* note 169, at 1252 ("Knowledge of the poor success rates could dissuade potential whistleblowers from blowing the whistle in fear of retaliation.").

176. *See supra* Section II.B.

177. *See* CTR. FOR PROGRESSIVE REFORM, *supra* note 152, at 26.

unlawfully, consult with an attorney or representative, decide whether to file, and file a complaint.[178] Subsequently, even when filed, OSHA frequently takes longer than the 90-day statutory deadline to investigate complaints, which can "contribut[e] to the erosion of evidence, signal[] to other workers that they should not speak up, and leav[e] the worker who was retaliated against in the lurch for months or years."[179] Finally, if OSHA does find that an employer unlawfully retaliated against an employee, there is no fine for breaking the law.[180] Instead, the employer is only responsible for the amount the employee would have earned, minus any amount the employee received from another employment source while the case was pending.[181]

There are several other whistleblower statutes that offer greater worker protections than the OSH Act and provide examples for reform. For example, the Surface Transportation Assistance Act and the Consumer Product Safety Improvement Act provide workers with 180 days to file a complaint, rather than 30 days.[182] Also, many modern whistleblower statutes require the enforcing agency to investigate a retaliation complaint within 30 or 60 days.[183] Finally, some whistleblower statutes allow for larger recoveries. The Taxpayer First Act of 2019, which prohibits employers from retaliating against employees who provide information in an investigation regarding underpayment of taxes, states that awards for successful plaintiffs include "the sum of 200 percent of the amount of back pay and 100 percent of all lost benefits, with interest."[184] Bringing the OSH Act in line with these provisions could reduce the considerable barriers that workers face when pursuing a claim, and help create a meaningful deterrent for employers.

OSHA reforms are critical to ensuring that all employees under OSHA's jurisdiction are equipped with the tools to file complaints and seek justice when employer violations do occur. At the time of writing this Note, Congress is not considering a reform to create a private right of action under the OSH Act or a reform to the Act's

178. *See id.*
179. *Id.*
180. *See id.* at 27.
181. *See id.*
182. *See id.*; *see also* Surface Transportation Assistance Act, 49 U.S.C. §31105(b)(1); Consumer Product Safety Improvement Act of 2008, Pub. L. No. 110-314, 122 Stat. 3016.
183. *See* CTR. FOR PROGRESSIVE REFORM, *supra* note 152, at 27.
184. 26 U.S.C. § 7623(d)(3)(B)(ii).

whistleblower provision. Thus, advocates should continue to call upon legislators to prioritize strengthening the OSH Act, as well as OSHA's enforcement efforts. In the meantime, it is useful to examine other avenues for legal reform that might provide protections to warehouse workers at risk of injury, in the absence of congressional action.

B. Restricting the Quota Directly: California's State Assembly Bills

In February 2020, California State Assemblywoman Lorena Gonzalez introduced Assembly Bill 3065 in the state legislature, which would have prohibited California employers from counting a "reasonable amount[] of time" that an employee spends in the restroom or accessing hydration as "toward the time required for completing the quota, or results in the employee having less time to complete the quota."[185]

The bill attempted to limit the common occurrence in warehouses where workers do not have time to use the restroom because of the quota. The text of the bill acknowledged that "[w]arehouse and distribution center employees who work under such quotas frequently skip restroom breaks in order to keep up with their quota."[186] Restricted access to restrooms and water breaks can lead to medical issues such as urinary tract infections[187] or dehydration,[188] as well as the spread of illnesses such as COVID-19 when workers do not have adequate time to wash their hands.[189] Although Amazon has claimed

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185. Assemb. B. 3065, 2019–2020 Reg. Sess. (Cal. 2020).

186. *Id.*

187. *See* MARC LINDER & INGRID NYGAARD, VOID WHERE PROHIBITED: REST BREAKS & THE RIGHT TO URINATE ON COMPANY TIME 47–54 (1998) (describing several studies that report the connection between long work hours without access to restroom breaks and resulting health conditions, including urinary tract infections, incontinence, enlarged prostates, kidney damage, and others); *see also* Alia Wong, *Using the Restroom: A Privilege — If You're a Teacher*, ATLANTIC (July 27, 2015), https://www.theatlantic.com/education/archive/2015/07/teachers-not-enough-bathroom-time/399629/ [https://perma.cc/X7FZ-RGV8] (discussing researchers who found that women who did not have enough water to drink at work were more than twice as likely as women who did drink adequate amounts of water to develop urinary tract infections).

188. *See* HUM. IMPACT PARTNERS, *supra* note 29, at 11 ("Restricting water intake causes dehydration, which is hazardous to health . . . .").

189. *See Handwashing — Why It's Important*, BETTER HEALTH CHANNEL, https://www.betterhealth.vic.gov.au/health/conditionsandtreatments/handwashing-why-its-important [https://perma.cc/7YKC-B92X] (last visited June 12, 2021); *see also Hand Hygiene at Work*, CTRS. FOR DISEASE CONTROL & PREVENTION,

that the company changed its policy in the spring of 2020 to ensure that time spent washing hands did not count against an employee's quota, several employees reported that they were never informed of this policy change, and therefore continued to skip bathroom breaks or hand washing to make rate.[190]

While the California bill passed in the State Assembly by a margin of 52 to 20,[191] it failed in the State Senate.[192] Critics of the bill expressed concern that the bill's text did not define or otherwise provide guidance on what constituted a "reasonable" amount of time in the restroom or on a hydration break, and this lack of clarity could make it difficult for employers to comply.[193]

In February 2021, Assemblywoman Gonzalez introduced another bill, Assembly Bill 701, targeting warehouse productivity quotas.[194] The bill acknowledges the relationship between productivity quotas and high risks of injury or illness, and states that "[t]he workforce in warehouse and logistics is largely comprised of people of color who depend upon these jobs to provide for their families and often see no alternative but to prioritize quota compliance over their own safety."[195] The bill seeks to increase transparency about the use of warehouse productivity quotas and place restrictions on what behavior can be considered time off task.

Assembly Bill 701 would require employers to provide employees, upon hire, with written descriptions of quotas to which they are

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https://www.cdc.gov/handwashing/handwashing-corporate.html [https://perma.cc/M78R-YNL9] (last visited June 12, 2021).

190. *See* Isobel Asher Hamilton, *Amazon Said It Lets Warehouse Workers Wash Their Hands and Miss Quotas Without Being Penalized. Workers Suing the Company Say They Were Never Told*, BUS. INSIDER (July 14, 2020, 6:47 AM), https://www.businessinsider.com/amazon-workers-lawsuit-wash-hands-penalty-coronavirus-2020-7 [https://perma.cc/F3SK-JMG5].

191. *See AB-3056 Warehouse Distribution Centers*, CAL. LEGIS. INFO., https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201920200AB3056 [https://perma.cc/4G8M-PGA8] (last visited Nov. 2, 2021).

192. *See* Rachel Sandler, *California Lawmaker Proposes Amazon-Focused Bill Protecting Workers from 'Abusive' Quotas*, FORBES (Feb. 16, 2021), https://www.forbes.com/sites/rachelsandler/2021/02/16/california-lawmaker-proposes-amazon-focused-bill-protecting-workers-from-abusive-quotas/?sh=7c8c5de5e3f8 [https://perma.cc/4XNL-TNZU].

193. *See* STAFF OF S. RULES COMM., SENATE FLOOR ANALYSIS, AB 3056, 2019–2020 Reg. Sess., at 5 (Cal. 2020).

194. *See* Press Release, Assemblywoman Lorena Gonzalez, Assemblywoman Gonzalez Introduces Bill to Protect Warehouse Workers from Hazardous Working Conditions (Feb. 16, 2021), https://a80.asmdc.org/press-releases/20210216-assemblywoman-gonzalez-introduces-bill-protect-warehouse-workers-hazardous [https://perma.cc/D5MM-VH52].

195. Assemb. B. 701, 2020–2021 Reg. Sess. (Cal. 2021).

subject, and include in those descriptions any adverse employment action that might result from an employee's failure to meet the quota.[196] The bill would also prohibit employers from taking adverse employment action against employees "for failure to meet a quota that does not allow a worker to comply with meal and rest periods, or occupational health and safety laws."[197] The bill further specifies that "[a]ny actions taken by an employee to comply with occupational health and safety laws in the Labor Code or division standards shall be considered time on task and productive time for purposes of any quota or monitoring system."[198] Under the bill, an employee could bring a suit for injunctive relief to obtain compliance with the above provisions, and if successful, would recover costs and reasonable attorney's fees.[199]

Assembly Bill 701 also includes a mandate requiring Cal/OSHA to propose standards by 2023 to "minimize[] the risk of musculoskeletal injuries and disorders among employees working in warehouse distribution centers."[200] The mandate stipulates that the standards shall address, among other considerations, "the relationship between quotas and risk factors for musculoskeletal injuries and disorders in warehouse distribution centers that employ production quotas."[201] Under the bill, Cal/OSHA would have the power to subpoena and inspect records of productivity quotas at warehouses in connection with the development of standards.[202] This mandate to create standards would allow Cal/OSHA to more closely regulate warehouses across the state, and fill gaps in federal OSHA regulations.[203] The standards could include targeted restrictions on productivity quotas, such as a firm limit on how many boxes workers are required to fill per hour, or more general safety protocols, like a requirement that workers be allowed a five-minute stretch and water break every hour.

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196. *See id.* § 2101.

197. *Id.* § 2102.

198. *Id.* § 2103(a).

199. *See id.* § 2110. However, the bill further provides that "[i]n any action involving a quota that prevented the compliance with regulations promulgated by the Occupational Safety and Health Standards Board, the injunctive relief shall be limited to suspension of the quota and any adverse action that resulted from its enforcement." *Id.*

200. Assemb. B. 701 § 6726(a).

201. *Id.*

202. *See id.* § 6726(b).

203. *See supra* notes 137–39 and accompanying text.

On May 28, 2021, Assembly Bill 701 passed the State Assembly by a margin of 52 to 19 votes.[204] While in the State Senate, senators amended the bill and removed the mandate requiring Cal/OSHA to propose standards to reduce ergonomic injuries in warehouses.[205] With this amendment, the bill passed in the State Senate on September 8, 2021, and was signed by the Governor two weeks later.[206]

C. Restricting Electronic Monitoring in the Workplace: Massachusetts and Illinois Bills

i. The Massachusetts Approach

In February 2021, State Senator Cynthia Stone Creem introduced a bill in the Massachusetts State Senate called the Massachusetts Information Privacy Act.[207] Among other things, the bill would place several restrictions on employers when using electronic monitoring. The bill defines electronic monitoring as "the collection of information concerning employee activities, communications, actions, biometrics, or behaviors by electronic means."[208] This would likely include employee productivity data gathered through Amazon's electronic system. The bill states that an employer shall not electronically monitor its employees unless the only purpose of the monitoring is to, "i. enable tasks that are necessary to accomplish essential job functions; ii. monitor production processes or quality; iii. comply with employment, labor, or other relevant laws; iv. protect the safety and security of employees," or another purpose deemed acceptable by the Massachusetts Department of Labor Standards.[209] The proposed legislation further stipulates that any electronic monitoring must be necessary to accomplish the allowable purpose,

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204. Fifty-one Democrats and 1 Republican voted in favor of the bill, while 1 Democrat and 18 Republicans voted against. *See Vote on AB 701 – AB 701 Lorena Gonzalez Assembly Third Reading*, OPENSTATES, https://openstates.org/vote/7a543fec-6c00-4e5d-b1d8-bd90500cfa6e/ [https://perma.cc/UH6U-X5H2] (last visited June 6, 2021); *see also AB-701 Warehouse Distribution Centers*, CAL. LEGIS. INFO., https://leginfo.legislature.ca.gov/faces/billVotesClient.xhtml?bill_id=202120220AB701 [https://perma.cc/6JH9-KFKX] (last visited June 6, 2021).

205. *See id.*

206. *See id.*

207. *See* S.D. 1726, 192d Gen. Ct., 2021 Sess. (Mass. 2021). At the time of writing this Note, the bill is still being considered by the Massachusetts State Senate.

208. *Id.* § 204(a).

209. *Id.* §§ 204(b)(1)(i)–(v).

be limited to the smallest number of employees, and collect the least amount of information necessary to accomplish the purpose.[210]

While the bill attempts to limit the use of electronic surveillance by employers, its language is likely broad enough to permit Amazon's employee surveillance. Amazon could justify its electronic monitoring of employees by saying such monitoring "enables[s] tasks that are necessary to accomplish essential job functions."[211] The company could argue that while employees use scanners that electronically monitor their productivity, the scanners instruct workers which items to pick and where to place them, which is essential to the job. Even if monitoring productivity did not fit into the first allowable purpose, it would fit into the second allowable purpose, which is "monitor[ing] production processes."[212]

The Massachusetts bill also states that when relying on information gathered from electronic monitoring to make employment-related decisions, including discipline and termination, employers cannot make such decisions *solely* based on data from electronic monitoring.[213] In other words, if an employer intends to terminate an employee based on data gathered from electronic monitoring, such as productivity data, the employer must also base the termination on other information as well, such as a supervisor's assessment or complaints of co-workers. While this provision may afford some protection to workers, it would not be onerous for Amazon to find an additional reason to justify the termination, such as an instance of lateness. It is possible that identifying a reason for termination that is not based on electronic monitoring would cause Amazon inconvenience, particularly if the company felt the need to hire more supervisors to facilitate human-based surveillance. But the Massachusetts bill does not change the at-will employment framework, which allows employers to terminate employees for any reason provided the reason is not illegal.[214] Thus, while Amazon would have to find a second reason to justify terminating an employee, it would not need to be a good reason.

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210. *See id.* §§ 204(b)(2)(i)–(iv).
211. *Id.* § 204(b)(1)(i).
212. *Id.* § 204(b)(1)(ii).
213. *See id.* § 204(k).
214. *See supra* Section II.C.

ii. The Illinois Approach

In February 2021, the Illinois Employee Security Act was introduced in the state's General Assembly.[215] If passed, this bill would prohibit employers from discharging, disciplining, or promoting an employee based on data gathered through "electronic monitoring," which is defined as "the collection of information concerning worker activities, communications, actions, biometrics, or behaviors by electronic means including, but not limited to, video or audio surveillance, *electronic work pace tracking*, and other means."[216] The bill further stipulates that employment decisions, such as termination or disciplinary action, must be based on "human-based information sources such as supervisors' assessments and documentation or consulting co-workers."[217]

The Illinois bill also includes a provision that would prohibit employers from discharging employees without just cause.[218] There are three types of reasons for discharge that comprise "just case."[219] The first reason provided by the bill, namely an employee's failure to satisfactorily perform job duties, is the most relevant to terminating an employee for not meeting a productivity quota.[220] The bill instructs factfinders to consider the following factors in determining whether an employee has been discharged for just cause for failure to satisfactorily perform job duties: the employee knew or should have known of the employer policy, the employer provided adequate training to the employee, the employer's policy was *reasonable* and applied consistently, and the employer undertook a thorough and fair investigation.[221] The employer bears the burden of proving just cause.[222]

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215. *See* S.B. 2332, 102d Gen. Assemb., Reg. Sess. (Ill. 2021). At the time of writing this Note, the bill is still being considered by the Illinois State Senate.

216. *Id.* § 5 (emphasis added).

217. *Id.* § 10(i).

218. *See id.* § 10(a). The just cause provision applies to employers generally, not just warehouse employers.

219. *Id.* § 5 (defining just cause as "(1) an employee's failure to satisfactorily perform his or her job duties or to comply with employer policies if the employee was afforded progressive discipline; (2) an employee's egregious misconduct; or (3) bona fide economic reasons").

220. *See id.*

221. *Id.* § 10(b) ("(1) the employee knew or should have known of his or her job duties or of the employer's policy; (2) the employer provided relevant and adequate training to the employee; (3) the employer's policy was reasonable and applied consistently; and (4) the employer undertook a thorough, fair and objective investigation.").

222. *Id.* § 10(g).

The bill provides that aggrieved employees or their representatives can file a complaint with the Illinois Department of Labor.[223] Upon receiving a complaint, or of its own volition, the Department would investigate the alleged violations, determine whether any violations occurred, and take appropriate action to enforce the rules laid out in the bill.[224] If an unlawful discharge is found, perhaps because the employer relied on electronic monitoring in making the decision or because the employer's policy was unreasonable, the bill provides for "actual and liquidated damages payable to each aggrieved worker equal to the greater of $10,000 or 3 times the actual damages including, but not limited to, unpaid wages, benefits, and other remuneration from the date of discharge."[225] The bill further specifies that in the case of an unlawful discharge where severance pay was not provided, the Department shall order "severance pay together with an additional 2 times that amount as liquidated damages, and such other remedies as may be appropriate including punitive damages."[226] In addition, the bill states that any individual claiming to be aggrieved by an employer's violation of the Act has a cause of action in any court.[227]

A law like the Illinois Employee Security Act would prohibit employers from using employee productivity data acquired through electronic monitoring systems to fire or discipline employees. Theoretically, if Amazon wanted to fire or discipline an employee for not making rate, the company would need to rely on a supervisor's assessment of the employees' productivity, which would make it more difficult for Amazon to enforce its quotas. While using supervisors to monitor employee productivity might seem like a simple policy change, a typical Amazon warehouse employs hundreds, sometimes several thousand, workers.[228] A law that restricted Amazon to only rely on human evaluation for disciplinary purposes, rather than its current electronic system, would be disruptive to the company's warehouse model. Tasking individuals with employee monitoring, rather than an electronic system, requires hiring more employees and would be less efficient than tracking productivity through electronic monitoring. Also, even if supervisors were able to identify which

223. *See id.* § 50(b).
224. *See id.*
225. *Id.* § 50(c)(1).
226. *Id.* § 50(c)(2).
227. *See id.* § 55.
228. *See Our Facilities*, AMAZON, https://www.aboutamazon.com/workplace/facilities [https://perma.cc/8DB4-PYPF] (last visited Nov. 2, 2021).

employees failed to meet their quotas without an electronic system, the proposed law would provide an opportunity for a factfinder to evaluate Amazon's quota policy for reasonableness when deciding whether the employee was terminated for just cause.[229]

It is worth noting that the Illinois bill does not prohibit electronic monitoring itself, as employers are still permitted to gather the data. The bill simply places restrictions on how the data can be used. Also, the bill allows employers to use data gathered through electronic monitoring in select circumstances, namely for non-employment-related purposes, for firing or disciplining workers in cases of egregious misconduct, or where there is a threat to the health and safety of others, or where required by state or federal law.[230] Prohibiting the collection of any data through electronic monitoring could be an extreme restriction because, as the text of the Illinois bill suggests, there may be purposes for such data gathering other than surveilling employee productivity. For example, if an employee is accused of assaulting a fellow employee during work hours, the Illinois bill would likely allow the employer to rely on electronic video footage documenting the assault to be the basis of the termination.

The Illinois bill also contains a provision about the posting of rights, which states that the Illinois Department of Labor will publish notices informing employees of their rights under the Act, and employers will be required to post such notices in a conspicuous place in the workplace, and give the notice to each employee at the time of hiring and on an annual basis.[231] This provision would help ensure that workers know that they cannot be terminated based on data gathered through electronic monitoring and that they can only be fired for just cause.

IV. A WAY FORWARD VIA THE ILLINOIS APPROACH AND THE CALIFORNIA MANDATE

States that wish to protect warehouse workers from undue workplace injuries should follow the Illinois approach, which restricts how employers can use electronic monitoring and installs a just cause mechanism in the state's employment law structure.[232] This model would be the most effective state legislative approach at preventing Amazon from terminating workers for failing to meet productivity

229. *See* S.B. 2332 § 10(b).
230. *See id.* § 10(i).
231. *See id.* § 40(a).
232. *See supra* Section III.C.ii.

quotas and would provide workers with recourse if such termination does occur. The Illinois approach combats several of the factors that have enabled Amazon to push its workers to the point of serious injury without repercussion, including unrestricted employee surveillance and at-will employment. When employees know that they can only be terminated for just cause and that employment decisions cannot be based on data gathered through electronic monitoring, they are less likely to work at dangerous speeds for fear of being fired. In addition, the provision of the bill providing a comprehensive financial award to workers who file successful complaints would lessen the financial risk associated with reporting a violation.

This Note also recommends an element of the original California bill, namely, the mandate for Cal/OSHA to propose and adopt standards aimed at limiting worker injuries in warehouses that use productivity quotas.[233] If other states with their own OSHA plans adopt similar provisions, such standards could provide greater protections to warehouse workers and fill gaps in federal OSHA regulations.[234]

A. Electronic Monitoring and Just Cause

States with Amazon warehouses should use the Illinois bill as a model. The Illinois approach would prohibit employers from using data gathered through electronic monitoring to make employment decisions.[235] A company like Amazon would be prohibited from disciplining or firing an employee based on electronic data about the employee's productivity rate.[236] Instead, an employment decision would need to rely on human-based information.[237] The Illinois approach is more stringent than the Massachusetts bill, which would prohibit employers from making an employment decision *solely* based on information gathered through electronic monitoring.[238] Under the Massachusetts bill, Amazon could skirt enforcement by pointing to another reason for the termination, such as an instance of

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233. *See* Assemb. B. 701 § 6726, 2020–2021 Reg. Sess. (Cal. 2021).

234. *See supra* notes 137–39 and accompanying text.

235. *See supra* note 216 and accompanying text.

236. *See supra* notes 216–17 and accompanying text.

237. *See* S.B. 2332 § 10(i), 102d Gen. Assemb., Reg. Sess. (Ill. 2021) (stipulating that employment decisions, such as termination or disciplinary action, must be based on "human-based information sources such as supervisors' assessments and documentation or consulting co-workers").

238. *See supra* note 213 and accompanying text.

lateness or a request for a shift change, and claim that it also contributed to the decision. In addition, since the Massachusetts bill does not include a just cause mechanism, the reasons for the termination would not need to be reasonable. By contrast, the Illinois approach completely removes data from electronic monitoring as a possible justification for employment decisions.[239]

One might argue that even under the Illinois approach, an employer's justification for discharging an employee could be pretextual. That is, Amazon could rely on electronic monitoring to terminate an employee but simply claim that the decision was based on a supervisor's assessment. While such a scenario is possible, the Illinois bill provides a second line of defense for workers by including the just cause requirement. As mentioned above, almost every state in the country currently has an employment-at-will framework, meaning that employers can fire workers for any reason, as long as the reason is not unlawful.[240] The just cause requirement in the Illinois approach would fundamentally change the framework by affirmatively requiring employers to have a good reason for termination.[241] Thus, even if an employer's reasons for a worker's discharge were pretextual, and were based on productivity data gathered through electronic monitoring, the just cause framework requires an employer to prove it had just cause for the firing, and a fact finder would have the opportunity to interrogate the employer's justifications and assess the employer policy for reasonableness.

A just cause requirement would also provide protection to workers if Amazon found a way to discern which employees were not making rate without using electronic monitoring. For example, if Amazon terminated an employee based on a supervisor's assessment that the employee was working too slowly, Amazon would have to prove just cause and that its policy of requiring employees to work at such speeds was reasonable. Thus, even if Amazon can measure a worker's productivity without the use of electronic monitoring,

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239. *See supra* Section III.C.ii.

240. *See* Odessky, *supra* note 94.

241. Factfinders would consider the following factors to decide if an employee was fired for just cause:

> (1) [T]he employee knew or should have known of his or her job duties or of the employer's policy; (2) the employer provided relevant and adequate training to the employee; (3) the employer's policy was reasonable and applied consistently; and (4) the employer undertook a thorough, fair and objective investigation.

S.B. 2332 § 10(b).

workers will have greater protections under the Illinois bill than they currently have.

The Illinois approach would also protect workers from being terminated for taking bathroom breaks or washing their hands — the situation that the California bill is trying to prevent. Under the Illinois approach, employers could not justify a termination based on data from electronic monitoring that showed an employee missed her productivity goal as a result of using the restroom. If an employer instead attempted to fire a worker based on a supervisor's assessment stating that the worker missed her productivity goal due to time spent in the restroom, factfinders would be able to evaluate the reasonableness of the productivity policy.

In addition, the Illinois approach would provide compensation to employees who were wrongfully discharged, namely, three times actual damages, as well as severance pay, combined with two times that amount as liquidated damages.[242] Providing such a comprehensive award to workers who have been wrongfully terminated is likely to make filing a complaint a more feasible course of action for employees and may also deter employers from firing workers without just cause.

The Illinois bill contains a provision that would require employers to post notices in a central location in the workplace informing employees of their rights under the Act.[243] This provision is crucial to include in the legislation because merely changing the law does not guarantee that employees will be aware of their rights and protections.

B. Critiques of a Just Cause Approach

As mentioned in Section II.C, defenders of at-will employment argue that it benefits both employers and employees, and that limitations on at-will, such as a just cause requirement, would interfere with freedom of contract.[244] But the enormous power imbalance between Amazon and its warehouse workers, who often do not have better job alternatives,[245] means that workers cannot bargain for safer working conditions. By requiring employers to terminate workers for a good reason, rather than for failure to meet dangerous

242. *See supra* notes 225–26 and accompanying text.

243. *See* S.B. 2332 § 40. Employers would also be required to provide the notice to employees at the time of hiring and on an annual basis. *See id.*

244. *See supra* Section II.C.

245. *See supra* Section II.B.

productivity standards, just cause protections can help ensure that employees can work at a safe pace.

There will likely be business critics of an Illinois-type approach, including Amazon itself. Such critics might argue that just cause protections force employers to retain unproductive workers or workers who violate rules.[246] However, the just cause protections embedded in the Illinois approach do not prohibit firings but instead simply require that the employer policy that led to the termination was reasonable.[247] For example, firing an employee who consistently arrived late to work would not violate the just cause requirement, provided the policy was applied consistently, and the employee knew of the lateness policy and received a warning that frequent tardiness could lead to termination.

Some might criticize the Illinois approach as too extreme because the just cause requirement would apply to all employers rather than just warehouse employers. It is possible that a provision with such a wide application would be met with greater opposition in state legislatures. However, states seeking to follow the Illinois approach that are worried about a blanket just cause requirement could tailor their legislation so that the just cause provision only applies to warehouse employers. Given the high rates of injury among warehouse workers,[248] the essential nature of their work,[249] and OSHA's failed attempts to reduce warehouse employee injuries,[250] including a just cause requirement that applies to warehouse employers is critical.

It is also worth highlighting that support for just cause policy is growing. In 2019, the Philadelphia City Council adopted a just cause law for parking lot workers, and in 2020, New York City approved just cause protections for fast-food employees.[251] A February 2021

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246. *See* Steven Greenhouse, *Firing Workers on the Boss's Whim? New York Puts a Stop to That.*, AM. PROSPECT (Dec. 24, 2020), https://prospect.org/labor/firing-workers-on-the-boss-whim-new-york-just-cause-law/ [https://perma.cc/KN73-HHKY] (reporting on critics of New York City's just cause law for fast-food workers: "Corporate critics of the just-cause law say it will strong-arm employers to retain workers who violate rules or are lazy or unproductive").

247. *See supra* Section III.C.ii.

248. *See supra* Part I.

249. *See* Alex Press, *Warehouse Workers Are Essential. It's Time We Treated Them That Way*, WASH. POST (Apr. 25, 2020), https://www.washingtonpost.com/outlook/2020/04/25/warehouse-workers-are-essential-its-time-we-treated-them-that-way/ [https://perma.cc/A77Q-UZ8G].

250. *See supra* Section II.D.

251. *See* TUNG ET AL., *supra* note 10, at 21.

poll revealed that 71% of voters in battleground congressional districts expressed support for the adoption of just cause laws.[252] Likely voters in contested congressional districts were asked: "In most jobs in the United States, a worker can be fired without any warning or explanation. Do you favor or oppose 'just cause' laws, which require that workers must receive advance notice and a good reason before they can be fired?"[253] This survey was consistent with previous polls, such as a 2020 Data for Progress survey, which found that just cause was supported by 67% of likely voters.[254] Thus, while just cause requirements may be unpopular among employers, there is increasing support for such protections among employees and city governments.

C. Mandate to State OSHA to Promulgate Standards

The 22 States with their own OSHA plans that cover private employers[255] should follow the example of the mandate originally included in California's State Assembly bill 701[256] and pass legislation requiring their state OSHA agencies to promulgate standards aimed at reducing employee injuries in warehouses. Such a mandate could lead state OSHA agencies to adopt standards that more directly regulate the use of productivity quotas, such as a strict limit on how many boxes a worker can be expected to fill per hour or a requirement that warehouses meet certain ergonomic guidelines. Given the gaps in federal OSHA regulations,[257] state OSHA agencies should step in to protect warehouse workers from frequent and serious injury.

To promulgate health and safety standards for warehouses, state OSHA agencies will need access to information about the use of productivity quotas in warehouses statewide. Such data will enable state OSHA agencies to understand how productivity quotas are being used and what kind of intervention is required to reduce worker injuries. Thus, legislation modeled after the California mandate

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252. *See id.* ("71 percent of voters in battleground congressional districts — including 67 percent of Republicans and 75 percent of Democrats — expressed support for the adoption of just-cause laws.").

253. *Id.*

254. *See id.* at IV (citing ALEXANDER HERTEL-FERNANDEZ, DATA FOR PROGRESS, WHAT AMERICANS THINK ABOUT WORKER POWER AND ORGANIZATION: LESSONS FROM A NEW SURVEY 4 (2020)).

255. *See State Plans*, *supra* note 118.

256. *See* Assemb. B. 701 § 6726, 2020–2021 Reg. Sess. (Cal. 2021).

257. *See supra* notes 137–39 and accompanying text.

should include provisions requiring employers to disclose to the state OSHA agency productivity quotas or goals used in the warehouse, including an explanation of any adverse employment action that an employee might face for failure to meet the quota.

CONCLUSION

Although warehouse workers perform essential work,[258] their health and safety have been neglected.[259] Amazon has sustained a workplace that drives workers to their physical limits, leading to employee injury rates far above the industry average.[260] The company has maintained such unsafe working conditions because of the limited regulation of employee surveillance, the lack of job alternatives for warehouse workers, the ubiquity of at-will employment, and the limitations on federal OSHA's regulatory and enforcement capabilities.[261]

States should take inspiration from the Illinois approach and enact legislation that both restricts how electronic monitoring data can be used and creates a just cause requirement for warehouse employers. Such legislation would make it more difficult for companies like Amazon to fire employees based on electronic monitoring and place an affirmative obligation on warehouse employers to have a good reason for terminating workers. Workers would not need to work at dangerous speeds for fear that failing to meet an unreasonable quota would get them fired. They would not need to avoid using the restroom or taking water breaks.

States with their own OSHA plans that cover private employers should pass legislation requiring their state OSHA agencies to adopt standards to reduce employee injury rates at warehouses. Such standards could more specifically target warehouse worker safety and fill in gaps in federal OSHA regulation.

Employees should not be forced to work at speeds that sacrifice their well-being. Enacting legislation similar to the Illinois approach and the California mandate is a crucial first step to creating safe work environments for warehouse employees.

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258. *See* Press, *supra* note 249.
259. *See supra* Part I.
260. *See supra* Part I.
261. *See supra* Part II.