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OSHA's Comprehensive Failure to Protect Workers During the COVID-19 Pandemic

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OSHA’s Comprehensive Failure to Protect Workers During the COVID-19 Pandemic

Nancy M. Modesitt*

ABSTRACT

Under the Trump Administration, the Occupational Safety and Health Administration (“OSHA”), failed to protect workers from COVID-19, which has led to deadly workplace outbreaks of the virus. OSHA’s failures began when it refused to produce legally-binding rules, known as emergency temporary standards, that would mandate the most basic step of requiring masks in the workplace to protect workers from the risks of infection on the job. In addition, while OSHA did produce non-binding guidance for employers, that guidance was unclear and fundamentally deficient in failing to require masks in all workplaces and failing to require recordkeeping that would identify potential outbreaks in workplaces in their early stages. OSHA also refused to use its enforcement authority in a way that would encourage employers to use risk-mitigation strategies in the workplace. Rather than increasing inspections to send a signal that employers need to protect workers from COVID-19, OSHA conducted fewer inspections during the pandemic than it had in previous years. Essentially, OSHA has provided a playbook of what not to do in a pandemic. This Article exposes the details of OSHA’s failed response to COVID-19, outlines actions that would be effective in protecting workers during a pandemic, and recommends structural, legislative changes that would enable OSHA to better respond to pandemics in the future.

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INTRODUCTION

The novel coronavirus has exposed significant flaws in the system of protecting employee safety in the United States. The federal agency tasked with protecting workers, the Occupational Safety and Health Administration (“OSHA”), failed to protect workers from the risks of infection with COVID-19. First, OSHA failed to produce legally-binding rules that would require employers to take even the most basic steps to protect workers from the risks of infection on the job. Second, the non-binding guidance that OSHA pro-

vided was fundamentally deficient because it failed to require masks in workplaces, failed to require employers to take action to induce infected employees to stay out of the workplace, and failed to require recordkeeping that would identify potential outbreaks in workplaces in their early stages. Third, OSHA failed to use its investigative authority in a way that would encourage employers to use risk-mitigation strategies in the workplace. Instead, OSHA conveyed the message to employers that it would not take action to protect workers and that employers need not be concerned with penalties for failing to take basic steps to protect workers.

This Article begins by explaining the fundamentals of OSHA and how OSHA and state agencies provide safety and health protection in the workplace. The Article then analyzes the myriad of ways in which OSHA fundamentally and irresponsibly failed in its most basic obligation to protect workers from the risks of COVID-19. This Article explains what actions OSHA should have undertaken and then proposes amendments to the Occupational Safety and Health Act¹ that would allow OSHA to respond to any future emergencies in the workplace more effectively.

I. WORKPLACE PROTECTION IN THE UNITED STATES: OSHA AND STATE SYSTEMS

The Occupational Safety and Health Act of 1970 (“the OSH Act”) was the first federal employment health and safety statute of general applicability. Before the OSH Act, protection of employee safety and health was primarily a creature of state law, with a few exceptions for areas of specific federal interest.² However, these state safety and health protection systems for employees were generally seen as insufficient to adequately protect workers. In the years before the OSH Act was passed, approximately 14,000 American workers died on the job each year, and another 2.5 million suffered job-related disabilities.³ Workplace safety varied greatly from state to state, with the job accident rate at 19 job accidents per 100,000 workers in some states and at 110 job accidents per 100,000 workers in other states.⁴

The OSH Act created a dual system of workplace safety and health protection. While there would be a federal agency (the Oc-

1. Occupational Health and Safety Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (1970) (codified as 29 U.S.C. §§ 651–678).

2. *See, e.g.*, The Federal Mine Safety Act, 30 U.S.C. §§ 801–966.

3. Lloyd Meeds, *A Legislative History of OSHA*, 9 GONZ. L. REV. 327, 327 (1974).

4. *Id.* at 330.

cupational Health and Safety Administration) to establish baseline safety and health standards,⁵ the OSH Act's goal was to create a decentralized system,⁶ in which states would establish their own OSHA-like agency⁷ and these state agencies would have greater control than OSHA over safety and health.⁸ By 1976, approximately half the states had established their own agencies, with the approval of OSHA, to oversee the safety and health of employees within that state.⁹ Since then, there has not been substantial change. However, while many states retain their own agencies to oversee occupational safety and health, OSHA's requirements provide a floor for all states.

A. *Overview of the OSH Act*

The OSH Act, which has only been modified slightly since its enactment, contains several components. First, it sets out an employer's general obligation "to 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."¹⁰ This provision is known as the general duty clause. Second, the OSH Act requires employers to comply with safety and health standards promulgated pursuant to the Act.¹¹ Third, the OSH Act authorizes the Secretary of Labor to conduct inspections and investigations of workplaces.¹² The Secretary is also authorized to issue citations and fines for violations of the OSH Act.¹³ Fourth, employers are required to maintain records as required by the Secretary of Labor.¹⁴

The OSH Act also addresses employee rights and obligations. Employees are required to comply with safety and health standards.¹⁵ Employees are entitled to file a complaint for violations of safety or health standards¹⁶ and request an inspection of their work-

5. See 29 U.S.C. § 667(c)(2) (requiring that state safety and health standards be "at least as effective" as the federal standards).

6. See *id.* § 667 (establishing standards for states to assume authority).

7. *Id.*

8. *Id.*

9. OSHA, U.S. DEP'T OF LAB., REFLECTIONS ON OSHA'S HISTORY 15 (2008).

10. 29 U.S.C. § 654(a)(1).

11. *Id.* § 654(a)(2).

12. *Id.* § 657(a).

13. *Id.* §§ 658–659.

14. *Id.* § 657(c). The statute required the Secretary of Labor to coordinate with the Secretary of Health, Education, and Welfare in determining what record-keeping would be required.

15. *Id.* § 654.

16. *Id.* § 657(f)(2).

place for violations of safety or health standards that threaten physical harm or present an “imminent danger” in the workplace.¹⁷ A prohibition on retaliation by the employer protects an employee’s right to file a complaint.¹⁸ However, the only right an employee has if employer retaliation occurs is to file a claim with the Secretary of Labor.¹⁹

Shortly after the passage of the OSH Act, the Secretary of Labor delegated his authority under the OSH Act to the newly-created position of Assistant Secretary of Occupational Safety and Health and the newly-created agency known as the Occupational Safety and Health Administration.²⁰ Pursuant to this delegation of authority, under the direction of the Assistant Secretary, OSHA has since been responsible for developing safety and health standards.²¹

While interested parties may petition for OSHA to promulgate safety and health standards,²² OSHA has wide latitude in determining whether to do so.²³ However, Congress has at times required OSHA to issue a standard. For example, in 1987, Congress demanded that OSHA issue standards for hazardous waste operations.²⁴ Similarly, in 1991, Congress required OSHA to issue a final standard for bloodborne pathogens.²⁵

B. Overview of OSHA’s Safety & Health Standards

Pursuant to the OSH Act, OSHA may promulgate three types of standards to protect worker safety: national consensus standards, emergency temporary standards, and all other standards.²⁶ All three types of standards have different methods for promulgation. National consensus standards were to be drawn from existing agreements regarding safety standards. OSHA was required to de-

17. *Id.* § 657(f)(1).

18. *Id.* § 660(c)(1).

19. *Id.* § 660(c)(2).

20. Secretary of Labor’s Order 12-71, 36 Fed. Reg. 8754, May 12, 1971.

21. *Id.*

22. 29 C.F.R. § 1911.3 (2020).

23. *See Int’l Union v. Chao*, 361 F.3d 249, 254 (3d Cir. 2004) (holding that the Secretary of Labor has discretion to determine when to commence rulemaking proceedings).

24. Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, § 126(a)–(f), 100 Stat. 1613 (1986).

25. Pub. L. No. 102-170, § 100, 105 Stat. 1107 (1991).

26. 29 U.S.C. § 655.

velop these as soon as “practicable” and could only produce them within two years of the enactment of the statute.²⁷

Emergency temporary standards are effective upon publication in the Federal Register and require no notice and comment period.²⁸ However, upon publication of an emergency temporary standard, OSHA must immediately begin the process of developing a permanent standard to replace the emergency temporary standard.²⁹ The permanent standard must be promulgated within six months of the publication of the emergency temporary standard.³⁰

The remaining standards developed by OSHA are governed by traditional requirements of notice and comment rulemaking.³¹ The statute identifies the Secretary of Labor as the person responsible for commencing the development of a health or safety standard under the OSH Act.³² The statute provides that the Secretary³³ may promulgate an occupational safety or health standard when he determines that a rule “should be promulgated in order to serve the objectives of [the OSH Act].”³⁴ While “any interested person” may file a petition for OSHA to commence rulemaking proceedings,³⁵ discretion is vested in the Secretary to determine when it is appropriate to initiate such proceedings, regardless of petitions for action.³⁶

All three types of occupational safety and health standards have proven difficult to promulgate effectively. National consensus standards were plagued by problems such as the fact that many of the existing safety “standards” were not mandatory in their wording. When OSHA attempted to make national consensus standards mandatory, the change in wording led courts to determine that the

27. “[T]he Secretary shall, as soon as practicable during the period beginning with the effective date of this chapter and ending two years after such date, by rule promulgate as an occupational safety or health standard any national consensus standard.” *Id.* § 655(a).

28. *Id.* § 655(c).

29. *Id.* § 655(c)(3).

30. *Id.*

31. *See id.* § 655(b).

32. *Id.* § 652.

33. The Secretary of Labor has delegated that authority to the Assistant Secretary of OSHA. *See* 36 Fed. Reg. 8754 (1971).

34. 29 U.S.C. § 655(b).

35. 29 C.F.R. § 1911.3 (2020).

36. *See Int'l Union v. Chao*, 361 F.3d 249, 254 (3d Cir. 2004) (holding that the Secretary of Labor has discretion to determine when to commence rulemaking proceedings).

revisions to the standards prevented them from being considered national consensus standards.³⁷

OSHA has also struggled to promulgate permanent safety and health standards, resulting in a lack of protection for workers and calls for reform.³⁸ Two major hurdles for OSHA are the requirements that OSHA establish (1) that a safety or health hazard poses a “significant risk” in the workplace,³⁹ and (2) that the proposed standard is “feasible.”⁴⁰ An example of this struggle that garnered significant scholarly attention was the failure of OSHA to take prompt action to regulate diacetyl, a substance that caused irreversible damage to workers in microwave popcorn producing factories.⁴¹ OSHA failed to take action to regulate the substance, resulting in numerous workplace deaths and serious injuries to workers’ lungs. The diacetyl example illustrates one of the common issues OSHA faces when creating new standards: regulated industries challenging the science underlying OSHA’s proposed standards. Regulated industries have effectively used uncertainty in the precise details of risk exposure and resulting injury to prevent OSHA from promulgating standards, as occurred in the diacetyl context, as well as to successfully challenge OSHA standards once

37. See MARK ROTHSTEIN, OCCUPATIONAL SAFETY & HEALTH L. § 4:8 (2020) (discussing litigation problems with national consensus standards).

38. See Gwen Forté, *Rethinking America’s Approach to Workplace Safety: A Model for Advancing Safety Issues in the Chemical Industry*, 53 CLEV. ST. L. REV. 513, 529 (2006) (discussing OSHA’s failure to promulgate standards and noting that as of 2006 “OSHA has issued only fifty permanent standards”); Jason R. Bent, *An Incentive-Based Approach to Regulating Workplace Chemicals*, 73 OHIO ST. L.J. 1389, 1391 (2012) (noting that “the United States’ system for regulating employee exposures to hazardous chemicals in the workplace is broken” and calling for an entirely new system); Michael D. Sant’Ambrogio, *Agency Delays: How A Principal-Agent Approach Can Inform Judicial and Executive Branch Review of Agency Foot-Dragging*, 79 GEO. WASH. L. REV. 1381, 1399–400 (2011) (noting that “delays by OSHA in setting standards for workplace hazards deny workers intended benefits of the OSH Act” and suggesting reforms to the administrative system more broadly); Thomas O. McGarity, *Reforming OSHA: Some Thoughts for the Current Legislative Agenda*, 31 HOUS. L. REV. 99, 116 (1994).

39. See *Indus Union Dep’t, AFL-CIO v. Am. Petroleum Inst., Inc.*, 448 U.S. 607, 643 (1980).

40. See generally *Am. Textile Mfr. Inst., Inc. v. Donovan*, 452 U.S. 490 (1981).

41. See generally Andrew Scott Dulberg, *The Popcorn Lung Case Study: A Recipe for Regulation?*, 33 N.Y.U. REV. L. & SOC. CHANGE 87 (2009).

promulgated.⁴² Updating old standards has also been a problem for OSHA.⁴³

OSHA has also struggled to promulgate emergency temporary standards. The OSH Act requires that there be a “grave danger” to workers and that an emergency temporary standard be “necessary” to reduce the danger.⁴⁴ Because it is so difficult to meet the requirements to promulgate an emergency temporary standard, OSHA has failed to promulgate any since 1983.⁴⁵ Prior to 1983, OSHA attempted to promulgate emergency temporary standards on a number of occasions, but many of the standards were challenged in court and vacated or otherwise blocked from becoming effective.⁴⁶ While courts have provided various reasons for blocking emergency temporary standards,⁴⁷ a common focus was on the language that the standard be “necessary,” with courts determining that this requirement was not fulfilled.⁴⁸

C. Overview of OSHA’s Enforcement System

As noted above, OSHA has the right to conduct inspections and investigations of workplaces to ensure compliance with the general duty clause as well as specific safety and health standards. OSHA inspections can be either proactive in nature, when OSHA has no specific concern at a workplace, or reactive, when OSHA

42. David Michaels, M.P.H., Ph.D. & Celeste Monforton, M.P.H., *Scientific Evidence in the Regulatory System: Manufacturing Uncertainty and the Demise of the Formal Regulatory System*, 13 J.L. & POL’Y 17, 38 (2005) (noting that “the strategy of creating uncertainty regarding the risks associated with pharmaceutical use, chemical exposure, and the use of hazardous products, has been remarkably successful”).

43. See, e.g., John Howard, *Setting Occupational Exposure Limits: Are We Living in A Post-Oel World?*, 7 UNIV. PA. J. LAB. & EMP. L. 513, 525 (2005) (discussing problems updating permissible exposure limits).

44. 29 U.S.C. § 655(c).

45. CONG. RSCH. SERV., R46288, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (OSHA): EMERGENCY TEMPORARY STANDARDS (ETS) AND COVID-19 23 (2021).

46. *Id.*

47. See, e.g., *Dry Color Mfrs. Ass’n v. U.S. Dep’t of Lab.*, 486 F.2d 98, 106 (3d Cir. 1973) (finding that OSHA’s “conclusory statement of reasons [for the standard] places too great a burden on interested persons to determine and challenge the basis for the standard” and vacating the emergency temporary standard in part).

48. See, e.g., *Peach Growers Ass’n v. U.S. Dep’t of Lab.*, 489 F.2d 120, 129 (5th Cir. 1974) (“We find no substantial evidence in the record considered as a whole to support the determination by the Secretary that emergency temporary standards were necessary”); *Asbestos Info. Ass’n/N. Am. v. Occupational Safety & Health Admin.*, 727 F.2d 415, 426 (5th Cir. 1984) (“The Agency has not proved that the ETS, OSHA’s most dramatic weapon in its enforcement arsenal, is ‘necessary’ to achieve the projected benefits.”).

responds to information suggesting possible violations. Proactive inspections, which OSHA calls “targeted inspections,” focus on high-hazard industries.⁴⁹ Employers in these industries can avoid the normal inspection process if they participate in OSHA’s voluntary participation program (“VPP”). The program requires that OSHA certify workplaces as meeting certain safety and health criteria.⁵⁰ If a workplace has an injury and illness rate below the prevailing rate in its industry, the workplace is eligible to be in VPP.⁵¹ The company must undergo evaluations by OSHA and maintain a comprehensive health and safety management system that includes involvement of both management and front line employees, hazard control analysis, and safety and health training.⁵² For those workplaces outside of VPP, OSHA focuses on high-hazard industries.⁵³ Programmed inspections will occur more often in these industries, frequently pursuant to a national or regional emphasis program.⁵⁴ Size of the workplace is also a factor, as workplaces with ten or fewer employees are typically excluded from programmed inspections.⁵⁵

Reactive inspections occur in response to imminent danger, a worker’s complaint, a referral from another agency or entity, or a workplace fatality or severe injury.⁵⁶ In 2018, there were 5,250 workplace fatalities in the United States.⁵⁷ Under OSHA’s current Field Operations Manual, unprogrammed inspections are a higher

49. OSHA, *Fact Sheet, Occupational Safety and Health (OSHA) Inspections*, DEP’T OF LAB. (2016), <https://bit.ly/3jRvwiA> [<https://perma.cc/593L-88GC>].

50. OSHA has undertaken other experimental programs. See Randy S. Rabinowitz & Mark M. Hager, *Designing Health and Safety: Workplace Hazard Regulation in the United States and Canada*, 33 CORNELL INT’L L.J. 373, 389 (2000) (outlining various initiatives).

51. OSHA, DEP’T OF LAB., VOLUNTARY PROTECTION PROGRAMS POLICIES AND PROCEDURES MANUAL 17 (2020).

52. *Id.*

53. OSHA’s website sets out basic information about enforcement priorities. See generally OSHA, *Enforcement*, DEP’T OF LAB., <https://bit.ly/3htzdV0> [<https://perma.cc/M43Z-M4TY>] (last visited Aug. 9, 2021). It also contains detailed information about national and regional emphasis programs. *Id.* For a description of inspection priorities in general, see OSHA, FIELD OPERATIONS MANUAL, Ch. 2 (discussing types of inspections, including programmed inspections); OSHA, SCHEDULING SYSTEM FOR PROGRAMMED INSPECTIONS § B.1 (1995) (discussing creation of inspection list for programmed inspections).

54. See, e.g., OSHA, DEP’T OF LAB., NATIONAL EMPHASIS PROGRAM ON AMPUTATIONS IN MANUFACTURING INDUSTRIES 3 (2019) (describing the process for selecting workplace inspection sites under the program).

55. See OSHA, DEP’T OF LAB., SCHEDULING SYSTEM FOR PROGRAMMED INSPECTIONS § B.1.b.(1)(b) (1995).

56. *Id.*

57. U.S. BUREAU OF LAB. STAT., 2018 CENSUS OF FATAL OCCUPATIONAL INJURIES (2018).

priority than programmed inspections.⁵⁸ Specifically, inspections of workplaces involving imminent danger are the highest priority, followed by inspections of workplace fatalities and catastrophes.⁵⁹ Complaints about workplaces are the third priority for inspections, and regular programmed inspections are last on the list of priorities.⁶⁰

OSHA's Field Operations Manual requires the investigation of all work-related fatalities and catastrophes.⁶¹ A fatality is an "employee death resulting from a work-related incident or exposure; in general, from an injury or an illness caused by or related to a workplace hazard."⁶² A catastrophe is "the hospitalization of three or more employees resulting from a work-related incident or exposure."⁶³

OSHA's lack of effective enforcement systems in regulating workplace safety and health have long been recognized.⁶⁴ Problems arise when OSHA takes more of a command-and-control enforcement approach⁶⁵ as well as when OSHA has undertaken new governance models involving softer regulation.⁶⁶ Some of the calls to reform OSHA have focused on more effective enforcement.⁶⁷

OSHA inspections are a critical component of workplace safety and health. OSHA's inspections have been shown to reduce workplace injuries in the years following them, with proactive inspections having the largest impact.⁶⁸ Furthermore, inspections do

58. OSHA, DEP'T OF LAB., FIELD OPERATIONS MANUAL, ch. 2, tbl.2-1 (2020).

59. *Id.*

60. *Id.*

61. *Id.* at ch. 11, § II.C.1.

62. *Id.* § II.A.1.

63. *Id.* § II.A.2.

64. See John Howard, *OSHA Standards-Setting: Past Glory, Present Reality and Future Hope*, 14 EMP. RTS. & EMP. POL'Y J. 237, 263 (2010) ("Comprehensive reform of the Act has been a topic on the public policy agenda in the occupational safety and health community and in the Congress for twenty years.").

65. See Gwen Forté, *Rethinking America's Approach to Workplace Safety: A Model for Advancing Safety Issues in the Chemical Industry*, 53 CLEV. ST. L. REV. 513, 530 (2006) (noting that "a lack of resources also prevents OSHA from ensuring that businesses under its authority comply")

66. See generally, e.g., Susan Bisom-Rapp, *What We Learn in Troubled Times: Deregulation and Safe Work in the New Economy*, 55 WAYNE L. REV. 1197 (2009) (discussing problems with softer regulatory enforcement systems of new governance approaches under the Clinton and George W. Bush administrations).

67. See, e.g., Howard, *supra* note 64 at 263–65 (calling for statutory changes such as increasing fines and allowing private rights of action).

68. Amelia M. Haviland et al., *A New Estimate of the Impact of OSHA Inspections on Manufacturing Injury Rates, 1998–2005*, 55 AM. J. IND. MED. 964, 972 (2012).

not result in any job declines; in fact, they result in financial benefits in the form of reduced injury costs to employers.⁶⁹

Despite this evidence of the power of inspections, OSHA has struggled throughout its existence with obtaining the resources to conduct regular, or even occasional, inspections of workplaces. In 1992, it would have taken OSHA 84 years to inspect every workplace within its jurisdiction.⁷⁰ By 2013, the problem had grown worse, with an American Federation of Labor and Congress of Industrial Organizations (“AFL-CIO”) report finding that it would have taken 131 years to inspect each workplace.⁷¹

Over the years since its inception, the number of workplaces subject to inspection has grown while OSHA’s resources have remained generally flat.⁷² The problem has grown worse under the Trump administration. The average number of inspections in the first three years of the Trump administration was the lowest out of any three-year period since 2000.⁷³ As of the end of 2019, OSHA had the fewest number of inspectors in 40 years.⁷⁴

II. OSHA FAILED TO ADEQUATELY PROTECT WORKERS FROM COVID-19

Against this backdrop of long-term problems with OSHA’s standards-setting and enforcement processes, it is not surprising that OSHA’s response to COVID-19 has failed to adequately protect workers from infection in their workplaces. OSHA failed to enact an emergency temporary standard that would have set mandatory standards for employee safety. Instead, OSHA relied on developing nonmandatory guidance for employers, which was entirely inadequate in substance to protect workers. And when employers failed to act to protect employees, and those employees complained, OSHA then compounded its errors by failing to

69. David I. Levine et al., *Randomized Government Safety Inspections Reduce Worker Injuries with No Detectable Job Loss*, 336 *SCIENCE* 907, 907 (2012); Michael Foley et al., *The Impact of Regulatory Enforcement and Consultation Visits on Workers’ Compensation Claims Incidence Rates and Costs, 1999–2008*, 55 *AM. J. IND. MED.* 976, 987 (2012) (discussing the effect of state safety and health inspections).

70. Roy Mauer, *Report Finds OSHA Resources Lacking, Penalties Weak*, *SOC’Y FOR HUM. RES. MGMT.* (May 13, 2013), <https://bit.ly/2T7IHCS> [<https://perma.cc/AG49-6HTU>] (discussing AFL-CIO report from 1992).

71. *Id.*

72. *Id.*

73. See generally Deborah Berkowitz, *Workplace Safety & Health Enforcement Falls to Lowest Levels in Decades*, *NAT’L EMP. L. PROJECT* (Dec. 17, 2019), <https://bit.ly/3yZYNOj> [<https://perma.cc/2HDF-A4MC>] (discussing trends).

74. *Id.*

quickly and adequately investigate those complaints and undertake a system of programmed inspections.

A. *OSHA Failed to Create an Emergency Temporary Standard, Relying Instead on Nonmandatory Guidance Documents*

The Centers for Disease Control (“CDC”) identified the first case of COVID-19 in the United States as occurring on January 20, 2020.⁷⁵ While the early cases were travel-related, with importations of the virus from China and Europe, some community transmission was occurring as early as late January and early February in the United States.⁷⁶ On March 13, 2020, President Trump declared a national emergency due to the novel coronavirus.⁷⁷

Given the national emergency declaration, it would logically follow that the situation was sufficiently dire for OSHA to at least consider drafting an emergency temporary standard. The AFL-CIO petitioned for an emergency temporary standard on March 6, 2020,⁷⁸ and several Senators and Members of Congress urged Secretary of Labor Eugene Scalia to promulgate one.⁷⁹ The Director, the National Institute for Safety and Health (“NIOSH”), admitted in testimony before a congressional committee that SARS-COV-2 constituted a “grave danger” to American workers.⁸⁰ Despite legislative support, OSHA denied the AFL-CIO’s petition, reasoning that an emergency temporary standard “was not necessary” because OSHA’s guidance to employers and enforcement of existing standards “renders an [emergency temporary standard] unnecessary.”⁸¹ OSHA also noted that the evolving nature of the situation

75. Jennifer Harcourt et al., *Severe Acute Respiratory Syndrome Coronavirus 2 from Patient with Coronavirus Disease, United States*, 26 EMERGING INFECTIOUS DISEASE J. 1266, 1266 (2020).

76. See Michelle A. Jorden, MD et al., *Evidence for Limited Early Spread of COVID-19 Within the United States, January–February 2020*, 69 MORBIDITY & MORTALITY WKLY. REPS. 680, 680 (2020).

77. Proclamation No. 9994, 50 Fed. Reg. 15, 337 (Mar. 18, 2020).

78. Richard L. Trumka, *A Petition to Secretary Scalia for an OSHA Emergency Temporary Standard for Infectious Disease*, AFL-CIO (Mar. 6, 2020), <https://bit.ly/2VARUEJ> [<https://perma.cc/9XZY-SRJW>].

79. Justine Coleman, *Democratic Senators Call on OSHA to Issue Emergency Temporary Standard for Workers Due to Coronavirus Outbreak*, THE HILL (Mar. 10, 2020, 11:31 AM), <https://bit.ly/2UDoHbI> [<https://perma.cc/82FQ-AEQD>]; Press Release, Educ. & Lab. Comm., Chairman Scott, Rep. Adams Call on Secretary Scalia to Take Immediate Action to Protect Workers Against COVID-19 (Mar. 6, 2020), <https://bit.ly/3yHyCvJ> [<https://perma.cc/2BZS-L669>].

80. See Scott Schneider, *The Battle for an Emergency Temporary Standard to Address COVID-19*, LABORERS’ HEALTH & SAFETY FUND OF N. AM. (July 2020), <https://bit.ly/3iD0ony> [<https://perma.cc/NBZ7-NCNV>].

81. Letter from Loren Sweatt, Principal Deputy Assistant Sec’y, Dep’t of Lab., to Richard L. Trumka, President, AFL-CIO, (May 29, 2020).

called for using guidance documents, which could be easily revised.⁸²

The AFL-CIO petitioned for a writ of mandamus to force OSHA to promulgate an emergency temporary standard, but a panel of judges on the D.C. Circuit denied the petition, noting that “OSHA’s decision not to issue an [emergency temporary standard] is entitled to considerable deference.”⁸³

OSHA’s decision not to create an enforceable standard put employees at risk because the guidance documents issued were inadequate, as discussed below in Section II.B., and because of the lack of enforcement under the general duty clause, as discussed below in detail in Section II.C.

B. OSHA’s Guidance Was Inadequate to Abate the Risks of Infection

Instead of issuing an emergency temporary standard, OSHA’s first response to the pandemic occurred on March 9, 2020, when it issued “Guidance on Preparing Workplaces for COVID-19”⁸⁴ (“the March 2020 Guidance”). The very first page of the March 2020 Guidance indicates its nonmandatory nature by stating that “This guidance is not a standard or regulation, and it creates no new legal obligations. It contains recommendations.”⁸⁵ The March 2020 Guidance clearly states its voluntary nature by articulating what employers should do with a section called “Steps All Employers *Can* Take to Reduce Workers’ Risk of Exposure to SARS-CoV-2.”⁸⁶ Nowhere in the March 2020 Guidance is there any articulation of what employers must do to protect workers, except in general terms. At the beginning of the March 2020 Guidance, after the disclaimer indicating that the guidance is not a mandatory standard, it states that:

Pursuant to the OSH Act, employers must comply with safety and health standards and regulations issued and enforced either by OSHA or by an OSHA-approved State Plan. In addition, the OSH Act’s General Duty Clause, Section 5(a)(1), requires em-

82. *Id.*

83. *In re Am. Fed’n of Lab. & Cong. of Indus. Orgs.*, No. 20-1158, 2020 WL 3125324, at *1 (D.C. Cir. June 11, 2020).

84. *U.S. Department of Labor Offers Guidance For Preparing Workplaces for Coronavirus*, OSHA (Mar. 9, 2020), <https://bit.ly/3k0Z8Mj> [<https://perma.cc/6MUE-2JYN>].

85. *See generally* OSHA, DEP’T OF LAB., GUIDANCE ON PREPARING WORKPLACES FOR COVID-19 (2020), <https://bit.ly/3huOL1q> [<https://perma.cc/TY4X-9HHA>].

86. *Id.* at 7 (emphasis added).

ployers to provide their employees with a workplace free from recognized hazards likely to cause death or serious physical harm.⁸⁷

The March 2020 Guidance produced in response to the coronavirus borrows heavily from a 2009 guidance document that OSHA promulgated during the Obama administration called “Guidance for Preparing Workplaces for an Influenza Pandemic”⁸⁸ (“the 2009 Guidance”). OSHA could have used this 2009 Guidance as the basis for crafting an emergency temporary standard that was specifically focused on the risks of the coronavirus instead of influenza. Indeed, given that the risk of death from COVID-19 was higher than the risk of death from influenza, it would be appropriate to take more precautions and require more from employers to ensure worker safety. Instead of taking this approach, OSHA watered down the 2009 Guidance to make fewer recommendations that would impose costs and burdens on employers.

1. The Risk Pyramid and Improper Categorization of Most Workers as Being at Low or Medium Risk of Infection

One way OSHA diluted the 2009 Guidance was by changing the identification of groups of employees considered at medium risk of exposure. The 2009 Guidance developed a risk pyramid that categorized workplaces according to the risks of exposure to influenza in a pandemic.⁸⁹ This risk pyramid was copied into the March 2020 Guidance, with changes suggesting that most workers would be in the lowest risk group. The 2009 Guidance stated that “[t]he vast majority of American workplaces are likely to be in the medium exposure risk or lower exposure risk (caution) groups.”⁹⁰ The March 2020 Guidance flipped this wording to state that “[m]ost American workers will likely fall in the lower exposure risk (caution) or medium exposure risk levels.”⁹¹

Following up on this, OSHA altered the definition of the medium risk group in the March 2020 Guidance to make it less inclusive. In the 2009 Guidance, the medium risk group was defined as: “Employees with high-frequency contact with the general population (such as schools, high-population-density work environments,

87. *Id.* at 4.

88. See generally OSHA, DEP’T OF LAB., GUIDANCE ON PREPARING WORKPLACES FOR AN INFLUENZA PANDEMIC (2009), <https://bit.ly/3k2xb6B> [<https://perma.cc/JA5W-MYXN>].

89. *Id.* at 11.

90. *Id.* at 12.

91. OSHA, *supra* note 85, at 18.

and some high volume retail).”⁹² The 2009 Guidance clarified this definition, which was somewhat unclear as to whether high-population-density work environments were always medium risk or only when there is contact between the employees and the general population, by stating later in the Guidance that “[m]edium risk workplaces require frequent close contact between employees or with the general public.”⁹³

The March 2020 Guidance made the medium risk category of workers smaller by failing to clarify whether medium risk workplaces would include workers in high-population-density workplaces. The statement from the 2009 Guidance that medium risk workplaces include settings where there is “close contact between employees” is not present in the March 2020 Guidance. OSHA also limited the employees in medium risk workplaces by focusing the definition of medium risk on whether there was community transmission of COVID-19.⁹⁴ If there was no community transmission of COVID-19, then the medium risk group was limited to workers who “may have frequent contact with travelers who may return from international locations with widespread COVID-19 transmission.”⁹⁵ Thus, until there was community transmission, employers would categorize workplaces that have contact with the general population, which would have been medium risk under the 2009 Guidance, as being lower risk.⁹⁶ The March 2020 Guidance then divided the workplace risk based on whether there is community transmission of the virus.⁹⁷ If there was community transmission, then the medium risk group included workers who “may have contact with the general public (e.g., schools, high-population-density work environments, some high-volume retail settings).”⁹⁸ There were three problems with this definition: (1) it assumed that employers are aware of community spread; (2) it contained unrealistic expectations that there would be areas in the United States where community transmission would not occur; and (3) it was confusing as to whether those in high-population-density workplaces that *do not* have contact with the general public were included in the risk category. These problems were all avoided in the 2009 Guidance, which ignored the component of community transmission in favor of a clearer definition.

92. OSHA, *supra* note 88, at 11.

93. *Id.* at 29.

94. OSHA, *supra* note 85, at 20.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

A careful reading of the final category of workers, those with lower exposure risk, could indicate that workers in close quarters should be considered medium risk. The explanation of who is at a lower exposure risk provides that “[w]orkers in this category have minimal occupational contact with the public and other coworkers.”⁹⁹ Thus, one could infer that workers with more than minimal contact with other coworkers are not lower risk, and presumably would be medium risk. However, the phrase “minimal occupational contact” with coworkers could easily be read to place most workers into the lower exposure risk category, since most employees do not have physical “contact,” with their coworkers. In sum, OSHA’s guidance indicates that workers in the meatpacking industry would be either medium or lower risk, depending on whether there was community transmission of COVID-19.

In addition to categorizing workplaces in a manner that moved many workers from medium risk to lower risk, the March 2020 Guidance also eliminated suggestions to increase workplace safety for medium risk workers. The 2009 Guidance tells employers to “[i]nstruct employees to avoid close contact (within 6 feet) with other employees,”¹⁰⁰ and states that “employees should avoid close contact with their coworkers.”¹⁰¹ More generally, the 2009 Guidance tells employers “[t]he best strategy to reduce the risk of becoming infected with influenza during a pandemic is to avoid crowded settings.”¹⁰² In contrast, the March 2020 Guidance fails to mention keeping employees at any distance from each other, and fails to mention crowded settings at all. The focus, instead, is on avoiding individuals who are sick.¹⁰³

OSHA has gone on to produce additional nonmandatory guidance for employers on protecting workers from COVID-19. These guidance documents include general guidance on returning to work after the lockdowns imposed in many states,¹⁰⁴ industry-specific guidance,¹⁰⁵ and enforcement guidance.¹⁰⁶ While it is impossible to discuss all the guidance documents that OSHA produced, the Gui-

99. *Id.*

100. OSHA, *supra* note 88, at 29.

101. *Id.* at 27.

102. *Id.* at 26.

103. *See, e.g.*, OSHA, *supra* note 85, at 9 (recommending that employers develop policies for identifying and isolating sick workers).

104. OSHA, DEP’T OF LAB., GUIDANCE ON RETURNING TO WORK (2020), <https://bit.ly/3wzqGLj> [<https://perma.cc/9D3Z-HWX3>].

105. OSHA, *News and Updates*, DEP’T OF LAB., <https://bit.ly/3fXJmim> [<https://perma.cc/V9E9-6P3U>] (last visited Aug. 8, 2021) (containing OSHA guidance documents for specific industries).

106. *Id.* (containing OSHA enforcement guidance and memoranda).

dance on Returning to Work stands out because of its general applicability. In this guidance document, OSHA fails to correct the problems with the risk pyramid.¹⁰⁷ It does, however, recommend social distancing at work.¹⁰⁸

2. *OSHA's Guidance Failed to Require Face Masks in Workplaces*

Another way in which OSHA's guidance documents failed to protect workers is the lack of focus on ensuring masks are used in the workplace. OSHA's March 2020 Guidance failed to protect any worker in a congregate setting with this lack of emphasis on masks. As a general statement, OSHA tells employers to: "Take steps to limit [the] spread of the respiratory secretions of a person who may have COVID-19. Provide a face mask, if feasible and available, and ask the person to wear it, if tolerated."¹⁰⁹ As noted above, the non-mandatory nature of the March 2020 Guidance makes all of its statements mere exhortations. This problem is exacerbated by limiting language. Terms like "if feasible and available" and "if tolerated" undercut the overall impact of the instructions to use a mask.

Exacerbating this problem is the March 2020 Guidance's lack of clear instructions as to whether masks were required for most workers. As discussed above, the March 2020 Guidance categorized workers by their risk of exposure and recommended greater protections for workers at the higher end of the exposure pyramid. The March 2020 Guidance completely failed to recognize the risks of exposure in workplaces such as meatpacking plants, where workers are very close together for hours at a time. Only first responders, health care, laboratory, and morgue workers were identified as high risk workers.¹¹⁰ Employers of these workers were instructed to provide personal protective equipment ("PPE"). Medium risk workplaces were defined as: "those that require frequent and/or close contact with (i.e., within 6 feet of) people who may be infected with SARS-CoV-2, but who are not known or suspected COVID-19 patients."¹¹¹

For medium risk workers, OSHA's guidance to employers regarding face masks was, "Workers with medium exposure risk may need to wear some combination of gloves, a gown, a face mask,

107. OSHA, *supra* note 104.

108. *Id.* at 7.

109. OSHA, *supra* note 85, at 10.

110. *Id.* at 19.

111. *Id.* at 20.

and/or a face shield or goggles.”¹¹² Whether these workers need to wear any of this PPE was to be determined based on “the results of the employer’s hazard assessment.”¹¹³ And if companies determined that their workers were in the lower risk category, which could include most workplaces, including congregate settings like meatpacking factories, due to OSHA’s poor drafting of the risk categories, then they need not take any steps to protect workers from COVID-19.¹¹⁴

Essentially, OSHA’s nonmandatory guidance told most companies that they could determine the risk level of their workers and then allowed them to either provide no protective gear, including face masks, or provide protective gear only if their own self-assessment indicated that it was necessary. In short, OSHA gave most companies a green light to do nothing to protect their workers.

Unsurprisingly, then, companies failed to provide face masks to their employees in the weeks after OSHA’s guidance was issued. The meatpacking industry is a clear example of the consequences of failing to require masks. A Washington Post investigation revealed that workers were not provided with face masks at a Tyson’s meatpacking plant in Iowa. As a result, some workers wore items such as eye masks while others wore no face coverings at all.¹¹⁵ Indeed, the largest meatpacking company in the world, JBS, admitted that it did not receive masks for its workers until April 2 and did not require them to be worn until April 13.¹¹⁶ Tyson Foods admitted that it did not require masks until April 15. And Smithfield workers reported that they did not receive masks until sometime in early April.¹¹⁷ In essence, three of the largest companies in the meatpacking industry failed to make mask-wearing, the most basic of the steps needed to reduce transmission, mandatory until approximately a month after the OSHA guidance was released. Furthermore, these steps appear to have been taken not in response to OSHA, but in response to the threat of state and local officials shutting down plants.¹¹⁸

112. *Id.* at 22.

113. *Id.*

114. *Id.* at 20–21.

115. Taylor Telford & Kimberly Kindy, *As They Rushed to Maintain U.S. Meat Supply, Big Processors Saw Plants Become Covid-19 Hot Spots, Worker Illnesses Spike*, WASH. POST (Apr. 25, 2020), <https://wapo.st/3qZxC3j> [<https://perma.cc/7DRB-TR9B>].

116. *Id.*

117. *Id.*

118. *See id.*; *see also* Michael Grabell et al., *Emails Reveal Chaos as Meatpacking Companies Fought Health Agencies Over COVID-19 Outbreaks in*

The lack of effective guidance on masks extended beyond meatpacking companies. While it is possible to argue that OSHA initially did not come out with a strong mask mandate because of a nationwide shortage, that shortage ended fairly quickly, except for surgical and N-95 masks. On June 18, 2020, OSHA had the opportunity to strongly encourage employers to mandate masks in all workplaces where employees would interact with others when it promulgated its guidance on returning to work after the numerous state-level shutdowns.¹¹⁹ Unfortunately, OSHA failed to do so. With respect to face masks, OSHA stated, “Employers may consider requiring cloth face coverings to be worn in the workplace.”¹²⁰ Even in OSHA’s COVID-19 FAQ section on its website, the agency’s stance on masks is not clear. It states that “OSHA generally recommends that employers encourage workers to wear face coverings at work.”¹²¹ The terms “recommends” and “encourage” make it clear that this is not an OSHA mandate, and that employers are not responsible for requiring masks or providing them.

In sum, the general guidance documents for employers failed to mandate face masks in the workplace. And while there was a lack of consensus on the value of face coverings very early on in the pandemic, by April 3, 2020, the CDC had recommended the use of masks.¹²² One of the reasons for the recommendation is because the CDC recognized that asymptomatic individuals could spread

Their Plants, PROPUBLIC (June 12, 2020), <https://bit.ly/3qZrOqg> [<https://perma.cc/Q9ZQ-FH2X>].

119. OSHA, *U.S. Department of Labor Issues OSHA Guidance As Non-Essential Businesses Reopen and Employees Return to Work*, U.S. DEP’T OF LAB. (June 18, 2020), <https://bit.ly/2UB7C7r> [<https://perma.cc/Z4FN-ZU8A>].

120. OSHA, *supra* note 104, at 15. There is a location in the Guidance where OSHA makes a stronger recommendation, stating that employers should “ensur[e] workers wear appropriate face coverings, such as cloth face masks.” *Id.* at 8. However, this statement is buried in a section focusing on engineering, administrative controls, and personal protective equipment, making it unclear whether all employers should do this or whether it is limited to situations where the employer’s risk assessment calls for using personal protective gear or administrative controls. Since the guidance does not discuss selection of these types of controls, employers would need to follow the instructions for selecting appropriate controls from the March 2020 Guidance. As discussed above, that document does not require anything of employers for lower risk workplaces. And for medium risk workplaces, it requires only an evaluation, not PPE, and contains no mandate for a face mask.

121. OSHA, *COVID-19 Frequently Asked Questions*, DEP’T OF LAB., <https://bit.ly/3yzURnB> [<https://perma.cc/E3VR-T9EZ>] (last visited Aug. 11, 2021).

122. See Colin Dwyer & Allison Aubrey, *CDC Now Recommends Americans Consider Wearing Cloth Face Coverings In Public*, NPR (Apr. 3, 2020), <https://n.pr/2TWiTde> [<https://perma.cc/7DPH-T2XZ>].

the infection.¹²³ By summer 2020, it was clear that face masks were a significant tool in preventing infection.¹²⁴ Despite this consensus and the data indicating that requiring face masks would cut down on infection rates¹²⁵ and potentially make infections that did occur less serious,¹²⁶ OSHA failed to mandate mask use in the workplace.

3. *OSHA's Guidance Allowed Employers to Keep Sick Workers on the Job*

In addition to the lack of effective guidance on face masks, OSHA's guidance failed to protect workers because its nonmandatory nature allowed companies to ignore its recommendations about removing sick workers from the workplace and preventing sick workers from being allowed to work. In its overview of what employers are encouraged to do, the March 2020 Guidance stated that “[a]s appropriate, all employers should implement good hygiene and infection control practices, including . . . [e]ncourage [sic] workers to stay home if they are sick.”¹²⁷ The March 2020 Guidance also contained a section with more details on how employers should handle potentially infected workers. This section suggested that employers “actively encourage sick employees to stay home.” As with OSHA's recommendations for face masks, the language used was nonmandatory and fettered with limitations, such as the term “as appropriate,” which provided employers with discretion to determine what is appropriate.

Furthermore, the recommendation was limited to currently “sick” workers, which undermined its applicability and efficacy in combatting COVID-19 infections. Individuals can spread the disease even when they are not displaying symptoms. Thus, those workers who were not “sick” but who were infected could remain in the workplace under the March 2020 Guidance.

Despite the problems described above with the OSHA recommendations, the March 2020 Guidance was much more clear about what employers should do about sick employees—not allow them

123. Laura Geggel, *Everyone Should Wear Face 'Masks' In Public, CDC Now Recommends*, LIVE SCI. (Apr. 3, 2020), <https://bit.ly/3qZE8XP> [<https://perma.cc/FNT4-EGE7>].

124. See Nina Bai, *Still Confused About Masks? Here's the Science Behind How Face Masks Prevent Coronavirus*, UNIV. OF CAL., S.F. (June 26, 2020), <https://bit.ly/3k1gyIJ> [<https://perma.cc/X47D-LNJU>].

125. *Id.*

126. Rong-Gong Lin II, *Wearing Masks Could Help You Avoid Major Illness Even if You Get Coronavirus, Experts Say*, L.A. TIMES (July 21, 2020), <https://lat.ms/3AJygX7> [<https://perma.cc/VDJ3-7CRV>].

127. OSHA, *supra* note 88, at 8.

in the workplace—than with its recommendations about face masks. However, employers failed to follow this basic suggestion about keeping sick workers out of the workplace. For example, at a JBS meat processing plant in Colorado, employees were encouraged to remain on the job even though they appeared to be sick.¹²⁸ One worker explained that when he asked to go home because he felt ill, his manager refused and required him to remain on shift for the rest of the day. When he went to urgent care that night, he had a fever of 104 and was hospitalized.¹²⁹ Health officials in the county where the plant was located complained about JBS's "work while sick" culture and found that 64% of workers who tested positive for COVID-19 at the plant had worked while symptomatic. Workers at Smithfield and Tyson also reported similar experiences of being encouraged to or told to work when they were sick.¹³⁰ Smithfield workers were offered a \$500 bonus to remain on the job through all of April, and even after the outbreaks began, were subject to a point system of attendance which resulted in discharge for missing 9 days of work per year.¹³¹

As these examples show, OSHA's nonmandatory guidance was clearly ineffective at getting employers to ensure that sick workers would stay at home. Perhaps OSHA enforcement actions—inspections in response to employee complaints, for example—could have motivated employers to take action. However, as discussed in Section II.C., OSHA utterly failed to take effective enforcement action.

4. *OSHA Guidance Failed to Require Reporting COVID-19 Infections, Which Allowed Outbreaks to Occur*

Existing regulations, which predate COVID-19, require that some employers keep records of workplace-related illnesses.¹³² However, there are numerous exemptions to these requirements. Employers with fewer than ten employees need not keep such records.¹³³ Companies in more than 80 different industries are also exempt from recordkeeping requirements, including dental offices, outpatient health care offices, legal service offices, pipeline opera-

128. Telford & Kindy, *supra* note 115.

129. *Id.*

130. *Id.*

131. A Smithfield worker, *I Work At Smithfield Foods. I'm Suing Them over Putting Our Lives at Risk for Your Dinner*, WASH. POST (Apr. 24, 2020), <https://wapo.st/3hwdAKm> [<https://perma.cc/24BE-PLRN>].

132. *See generally* 29 C.F.R. § 1904 (2020). Section 1904.4(a)(1) sets forth the limitation that only "work-related" illnesses are reportable.

133. 29 C.F.R. § 1904.1 (2020).

tions, retail stores, telecommunications, and internet service providers.¹³⁴ Even if they are generally exempt from most recordkeeping requirements, companies still must report to OSHA any “workplace incident that results in an employee’s fatality, in-patient hospitalization, amputation, or loss of an eye.”¹³⁵ Regardless of whether employers need to keep detailed records or only report on fatalities and other very serious incidents, the only injuries and illnesses that require reporting are ones that are “work-related.”¹³⁶ Employers are instructed to “consider an injury or illness to be work-related if an event or exposure in the work environment either caused or contributed to the resulting condition.”¹³⁷ Under these regulations, if an employee is exposed to COVID-19 in the workplace, and either dies or is admitted to the hospital, the employer must notify OSHA. However, these existing regulations fail to require the reporting of most incidents of COVID-19 in the workplace, because only a small percentage of cases result in hospitalization¹³⁸ or death.¹³⁹

These general reporting requirements for work-related illnesses are inadequate to protect employees from COVID-19. The nature of COVID-19, specifically, the ease with which it is transmitted from one individual to another, means that anytime one employee is within a few feet of a sick employee, there is the potential for transmission. Thus, to protect workers, employers should have been required to collect information about COVID-19 infections among its workers.

Unfortunately, the March 2020 Guidance says little about the need for companies to provide information to OSHA or anyone else about infections in the workplace. Only a few provisions address this need. The first mention of data gathering on infections is not found until page 12 of the March 2020 Guidance, where it states that employers should “[w]ork with insurance companies (e.g., those providing employee health benefits) and state and local

134. *Id.* § 1904.2 (2020); Nonmandatory app. A to Subpart B (2020) (listing industries by classification code).

135. 29 C.F.R. § 1904.2(a)(1) (2020).

136. *Id.* § 1904.4(a)(1).

137. *Id.* § 1904.5(a).

138. Brian Resnick, *12 Things Everyone Needs to Know About the Coronavirus Pandemic*, VOX (May 19, 2020), <https://bit.ly/36qmOBR> [<https://perma.cc/VM2D-CUL2>] (noting a hospitalization rate of 12% in the United States as of Mar. 2020).

139. Smriti Mallapaty, *How Deadly Is the Coronavirus? Scientists Are Close to an Answer*, NATURE (June 16, 2020), <https://go.nature.com/2UCnMZ5> [<https://perma.cc/WB7M-B9TP>] (noting that approximately .5–1% of people infected die from COVID-19).

health agencies to provide information to workers and customers about medical care in the event of a COVID-19 outbreak.”¹⁴⁰ The only other mention of data collection or reporting on illnesses in the workplace is buried in a paragraph about information available on OSHA’s COVID-19 webpage, where it states that more information is available, including information on “recordkeeping requirements and injury/illness recording criteria.”¹⁴¹ This statement appears to be referencing the general-illness reporting criteria discussed above, which is insufficient to prevent outbreaks in workplaces.

One would think that OSHA would have recognized the need to prevent outbreaks in the workplace as the pandemic continued by requiring employers to identify COVID-19 infections. However, OSHA took the opposite approach by substantially limiting recordkeeping related to COVID-19 when it first directly addressed recordkeeping in the pandemic. On April 10, 2020, OSHA issued its first guidance on reporting COVID-19 infections in the workplace.¹⁴² In this document, OSHA compounded the issues created by the lack of specificity in the March 2020 Guidance by nearly eliminating the reporting requirements for occupational illnesses. Specifically, unless the workplace involved health care, first responders, or correctional facilities, employers were told that they need not make the determination as to whether an infection in a worker was “work-related.”¹⁴³ As discussed above, it is only when an illness is work-related that there is any obligation to report it. Thus, by telling employers that they need not make this determination, OSHA was effectively instructing employers that COVID-19 infections were *not* work-related, and thus not reportable to OSHA. OSHA did note that when an employer had objective evidence of work-related transmission that was reasonably available, such as when there were “a number of cases developing among workers who work closely together,” the employer should make the determination of work-relatedness.¹⁴⁴ Under this approach, employers could essentially put their heads in the sand and wait until there were so many infections that it would be impossible to ignore transmission at work. The rationale for the enforcement guidance was that reducing the “difficult” determinations of work-related-

140. OSHA, *supra* note 85, at 12.

141. *Id.* at 18.

142. OSHA, ENFORCEMENT GUIDANCE FOR RECORDING CASES OF CORONAVIRUS DISEASE 2019 (COVID-19) (2020), <https://bit.ly/3xzmpsv> [<https://perma.cc/Q873-WZP7>].

143. *Id.*

144. *Id.*

ness would “help employers focus their response efforts on good hygiene practices in their workplaces.”¹⁴⁵ The message provided by this enforcement guidance is clear: tracking transmission in the workplace is less important than handwashing in the workplace.

This initial recordkeeping guidance was rescinded the following month. On May 26, 2020, OSHA promulgated new recordkeeping guidance.¹⁴⁶ The May recordkeeping guidance eliminated the presumption that COVID-19 was not a recordable illness unless it occurred in a workplace involving health care, first responders, or a correctional facility. Instead, OSHA essentially defaulted to the general recordkeeping standards required by 29 C.F.R. Part 1904,¹⁴⁷ with a specific requirement for testing that acted to limit the employer’s need to record an illness as COVID-19 and work-related. An employee’s illness was not to be considered COVID-19 unless there was a confirmed positive test for the disease.¹⁴⁸ This is a significant limitation, as testing in the United States was not readily available to all individuals.¹⁴⁹

Having a positive test was only the first criteria for a COVID-19 infection to be considered a recordable illness. In addition, the infection had to be work-related. In this new guidance, OSHA’s framing for making this determination appeared to push the inquiry in the direction against the illness being work-related. For instance, OSHA instructed that COVID-19 illnesses “are likely work-related when several cases develop among workers who work closely together *and there is no alternative explanation.*”¹⁵⁰ For workers who interact outside the workplace, this would be difficult to establish. Indeed, this limiting language “and there is no alternative explanation” is appended to each one of the scenarios in the recordkeeping guidance where OSHA indicates that the illness is likely work-related.¹⁵¹ Note that the language OSHA used, “likely work-related” did not even establish a presumption in favor of the illness being work-related. Tacking on the limitation of eliminating alternative

145. *Id.*

146. Lee Anne Jillings & Patrick J. Kapust, *Revised Enforcement Guidance for Recording Cases of Coronavirus Disease 2019 (COVID-19)*, U.S. DEP’T OF LAB.: OSHA (2020), <https://bit.ly/3AP84Kt> [<https://perma.cc/7SJV-Q6M5>]. While the document was published May 19, its effective date was not until May 26.

147. *See id.* (requiring recordkeeping if the employer meets the requirements of existing regulation).

148. *Id.*

149. Eric C. Schneider, *Failing the Test—The Tragic Data Gap Undermining the U.S. Pandemic Response*, 383 NEW ENG. J. MED. 299, 300 (2020) (discussing the shortages of testing in the United States).

150. OSHA, *supra* note 146 (emphasis added).

151. *See id.*

explanations stacks the inquiry against work-relatedness. In essence, as long as the employer could come up with an alternative explanation, the employer need not record the infection as being work-related. The “alternative explanation” requirement applies even in workplaces where employees are in close proximity to one another.

In neither of these recordkeeping guidance documents is there any mention of coordinating with local or state health departments. Nor do the documents reference the CDC’s guidance documents¹⁵² for employers on managing COVID-19 in the workplace. In short, OSHA’s guidance minimized the number of recordable COVID-19 infections and failed to suggest that employers had any role to play in working with health department officials to identify, track, and thereby limit outbreaks in workplaces in the United States.

Unsurprisingly, then, employers failed to provide information to health departments that could have helped stem the wave of infections. For instance, in North Carolina, Tyson brought in a contractor to run testing and then refused to provide the results of testing to local and state health officials until the contractor was threatened with litigation.¹⁵³ At one Tyson’s plant in Iowa, information on infections at the plant were not reported to health departments until May, when the governor ordered their disclosure. At that point, 58 percent of the workers at the plant had tested positive.¹⁵⁴

The attitude of some company officials is illustrated by a statement from the chief executive of Smithfield Foods, Kenneth Sullivan, who told the governor of Nebraska that “Social distancing is a nicety that makes sense only for people with laptops.”¹⁵⁵ This statement was made in an email expressing “grave concerns” over the stay-at-home orders, and it appeared that Mr. Sullivan’s primary concern was that workers might not show up for work.¹⁵⁶ In fact, Smithfield offered workers a \$500 “responsibility bonus” if they

152. The CDC maintained on its website detailed information for employers on limiting the spread of COVID-19 in the workplace. Unfortunately, the CDC guidance documents are all framed as voluntary on the part of the employer. See *Workplaces & Businesses*, CDC (June 22, 2021), <https://bit.ly/3wxXHAT> [<https://perma.cc/Y4GW-7PL6>]. The CDC recommended that employers work with local health departments to track and trace workplace infections; it did not require such cooperation. See *Case Investigation and Contact Tracing in Non-Healthcare Workplaces*, CDC (Oct. 22, 2020), <https://bit.ly/3hZozzp> [<https://perma.cc/2MU8-4Y6N>].

153. Grabell et al., *supra* note 118.

154. *Id.*

155. *Id.*

156. *Id.*

were at work for all their shifts from April 1 to May 1.¹⁵⁷ Even as late as in September, 2020, meatpacking plants continued to be one of the main sites of active COVID-19 clusters in Kansas, with “thousands of cases.”¹⁵⁸ And in Michigan, half of all the workplace deaths that were investigated by the state’s OSHA agency were linked to COVID-19.¹⁵⁹

In light of the early and ongoing clusters of workplace infections, it would have been appropriate for OSHA to develop new guidance on recordkeeping to allow more effective identification of workplace infection clusters. Instead, on September 30, 2020,¹⁶⁰ OSHA once again limited the reporting requirements for COVID-19 infections. On the OSHA COVID-19 FAQ webpage, OSHA limited circumstances under which COVID-19 cases would be reported. In response to the question as to when cases resulting in hospitalization were reportable to OSHA, OSHA stated, “in order to be reportable, an in-patient hospitalization due to COVID-19 must occur within 24 hours of an exposure to SARS-CoV-2 at work.”¹⁶¹ Because of the nature of the infection, it would be nearly impossible for hospitalization to occur within 24 hours of an infection in the workplace. The normal course of the infection requires an incubation period, followed by symptoms that increase in severity over time. The CDC has noted a median period of time from the onset of symptoms to ICU admissions of 9.5 to 12 days, making it highly unlikely that an employee would be at work 24 hours before being admitted to the hospital.¹⁶² Under this approach, hospitalizations for COVID-19 essentially would not be reported.

157. A Smithfield worker, *supra* note 131.

158. AP Wire, *Kansas Meatpacking Plants Have Highest Number of Active COVID-19 Cases*, FOX4 (Sept. 9, 2020, 7:06 PM), <https://bit.ly/3AQx97V> [<https://perma.cc/8LPJ-7WAU>].

159. Beth LeBlanc, *Half of All Workplace Deaths Investigated in Michigan Linked to COVID-19*, DETROIT NEWS (Oct. 23, 2020, 1:35 PM), <https://bit.ly/3yBKpLQ> [<https://perma.cc/4F87-C2WK>].

160. The OSHA website does not indicate dates of revision. However, law firms noticed the change, providing an indication of the timing. *See, e.g., Legal Developments Affecting the Workplace: Updated: OSHA Issues Revised Enforcement Guidance on Reporting COVID-19 Cases*, SULLIVAN & CROMWELL LLP (May 20, 2021), <https://bit.ly/3xCXmF2> [<https://perma.cc/LZN7-9RT3>] (noting the new recordkeeping information was posted on September 30, 2020).

161. OSHA, *Non-ETS Frequently Asked Questions*, DEP’T. OF LAB., <https://bit.ly/3g6aig7> [<https://perma.cc/4FT7-R3NU>] (last visited Aug. 11, 2021).

162. The CDC website has detailed information on the progression of the disease. *See Clinic Care Guidance*, CDC (Feb. 16, 2021), <https://bit.ly/3r9CBOY> [<https://perma.cc/2DM9-NQLK>].

C. *OSHA Failed to Enforce Existing Workplace Safety Standards to Protect Employees from COVID-19*

Even though OSHA failed to promulgate an emergency temporary standard that would require employers to take specific actions to protect workers from COVID-19, OSHA could have used existing requirements and taken rapid enforcement efforts to force employers to provide safe workplaces. OSHA utterly failed to do this.

OSHA indicated early on that even though its COVID-19-related guidance documents were not mandatory, employers were still required by law to provide a workplace “free from recognized hazards likely to cause death or serious physical harm.”¹⁶³ This requirement, known as the general duty clause, covers situations in which there is no specific OSHA safety or health standard. OSHA noted the applicability of the general duty clause in its March 2020 Guidance, stating that while there were no existing OSHA standards specifically designed for COVID-19 safety in the workplace, the general duty clause would apply.¹⁶⁴ Based on the general duty clause, OSHA has the authority to inspect most workplaces in the United States for health and safety violations even in the absence of a specific OSHA standard.

In June 2020, the National Safety Council (“NSC”) urged OSHA to create an emergency temporary standard. The NSC reasoned that OSHA needed an emergency temporary standard because the risks of workplace transmission were demonstrable, and OSHA had not been enforcing the general duty clause as a means of obtaining employer compliance with guidance documents.¹⁶⁵

Relying on the general duty clause, by its nature, imbues workplace safety with the discretion of the inspector. To establish a violation of the general duty clause, OSHA has to establish that:

- (1) an activity or condition in the employer’s workplace presented a hazard to an employee, (2) either the employer or the industry recognized the condition or activity as a hazard, (3) the hazard was likely to or actually caused death or serious physi-

163. 29 U.S.C. § 654(a)(1).

164. OSHA, *supra* note 85, at 17.

165. *Position/Policy Statement: Occupational Safety and Health Administration (OSHA) Regulatory Authority During the Coronavirus Pandemic*, NAT’L SAFETY COUNCIL (June 2020), <https://bit.ly/3wwJ9s2> [<https://perma.cc/AN7C-WB5Y>].

cal harm, and (4) a feasible means to eliminate or materially reduce the hazard existed.¹⁶⁶

The inspector has enormous discretion to determine whether there is a hazard in a particular workplace, given the layout and context of that workplace, as well as whether there is a feasible means to eliminate or materially reduce the hazard in that context.

In addition, it is clear from the agency's own conduct that OSHA disfavors using the general duty clause as the basis for enforcing workplace safety. As of early October 2020, the general duty clause was the basis for only 2 out of the 34 citations that OSHA issued for COVID-19-related matters.¹⁶⁷

OSHA did not use this tool to manage COVID-19 workplace risks through enforcement action. OSHA could have conducted inspections of workplaces that were showing transmission of COVID-19. OSHA could also have investigated employee-complaints of unsafe practices in the workplace. OSHA failed to take either of these steps. Instead, it issued enforcement guidance that limited on-site inspection of workplace complaints to health care settings and first responders.¹⁶⁸ All other workplace complaints were to be handled informally.¹⁶⁹ According to a former OSHA policy advisor under President Obama, such informal investigations are "nothing," in which OSHA simply sends "letters to the employer."¹⁷⁰

And, indeed, an investigation by The Washington Post in April 2020 revealed thousands of employee complaints about unsafe working conditions with little or no response from OSHA. Workers filed complaints about "shortages of masks and gloves, of being forced to work with people who appear sick, and of operating in cramped work areas that prevent them from standing six feet from one another."¹⁷¹ As of mid-May 2020, OSHA had received approxi-

166. *SeaWorld of Fla., L.L.C. v. Perez*, 748 F.3d 1202, 1207 (D.C. Cir. 2014) (citations omitted).

167. See OSHA, *Inspections with COVID-related Citations*, DEP'T OF LAB., <https://bit.ly/3dWiluy> [<https://perma.cc/U3DM-K9SJ>] (last visited Aug. 11, 2021) (listing citations by workplace and including legal basis for citation).

168. Patrick J. Kapust, *Memorandum re: Interim Enforcement Response Plan for Coronavirus Disease 2019 (COVID-19)*, DEP'T OF LAB.: OSHA (Apr. 13, 2020), <https://bit.ly/37vPgmo> [<https://perma.cc/46CW-9P6U>]

169. *Id.*

170. Rebecca Rainey, *Clash over Government Role in Worker Safety Intensifies as Businesses Reopen*, POLITICO (May 18, 2020, 6:18 PM), <https://politi.co/2UaR2WI> [<https://perma.cc/3LDH-A27P>] (quoting Debbie Berkowitz).

171. Peter Whoriskey et al., *Thousands of OSHA Complaints Filed Against Companies for Virus Workplace Safety Concerns, Records Show*, WASH. POST (Apr. 16, 2020), <https://wapo.st/3yUU3Jq> [<https://perma.cc/8E8G-XTDH>].

mately 3,990 COVID-19-related complaints.¹⁷² OSHA investigated less than ten percent of these complaints and issued no citations to employers.¹⁷³ In fact, one watchdog group reported that OSHA conducted an average of only 60 investigations per day in early 2020 as compared to 217 per day before the pandemic.¹⁷⁴ OSHA's lack of responsiveness was evident to workers; the president of the union that represents poultry workers commented that "People don't even waste their time calling OSHA anymore. We've called OSHA and they're useless."¹⁷⁵

Even in industries which showed signs of becoming the source of outbreaks in communities, OSHA failed to act. As discussed above, meatpacking plants quickly became some of the worst clusters of COVID-19 infection in the United States.¹⁷⁶ As of August 2020, at least 39,000 workers in meatpacking plants had tested positive, and at least 170 had died.¹⁷⁷ It would have been impossible for OSHA to be unaware of the problems in the meatpacking industry. As discussed in the previous section, workers at meatpacking plants reported having contacted OSHA about unsafe practices in their workplaces. As early as April 2020, the media had flagged meatpacking plants as being a source of outbreaks in communities.¹⁷⁸ Even lawmakers had contacted OSHA about the problems in meatpacking plants.¹⁷⁹ Smithfield itself acknowledged OSHA's incredibly slow response to the problems in the meatpacking industry. A company spokesperson stated that Smithfield asked OSHA

172. Rainey, *supra* note 170.

173. *Id.*

174. *Id.*

175. Whoriskey et al., *supra* note 171.

176. See Dan Charles, *How Widespread Coronavirus Testing Helped Meatpacking Plants Slow Outbreak*, NPR (June 22, 2020, 4:04 PM), <https://n.pr/3s63hR5> [<https://perma.cc/Y75L-H86E>].

177. Michael Grabell & Bernice Yeung, *Meatpacking Companies Dismissed Years of Warnings but Now Say Nobody Could Have Prepared for COVID-19*, PROPUBLICA (Aug. 20, 2020, 5:00 AM), <https://bit.ly/3B2Rg2R> [<https://perma.cc/AVN6-B45Y>]. Despite the fact that meatpacking companies were known outbreak sites, companies have even denied workers' compensation benefits to the employees who have died from COVID-19. Tom Hals and Tom Polansek, *Meatpackers Deny Workers Benefits for COVID-19 Deaths, Illnesses*, REUTERS (Sept. 29, 2020, 1:00 PM), <https://reut.rs/3enV7Of> [<https://perma.cc/FHP7-9CF6>].

178. See, e.g., O. Kay Henderson, *67% of Iowa's 389 COVID Cases Today Related to Meatpacking Plants*, RADIO IOWA (Apr. 19, 2020), <https://bit.ly/3AGD7Ii> [<https://perma.cc/MF6X-Z6JG>].

179. See *id.* (noting that three state lawmakers called upon OSHA to investigate a meatpacking plant in Iowa).

to visit its plants in March and April and that OSHA failed to do so.¹⁸⁰

The situation became sufficiently dire that local and state officials requested assistance from the CDC in early April.¹⁸¹ In late April, the CDC and OSHA jointly published guidance specifically for the meat processing industry. This guidance is housed on the CDC website, but not the OSHA website. Its limited nature is shown in several ways: (1) it is labeled as “interim” guidance; (2) unlike most OSHA guidance, it is not located on the OSHA website; and (3) it is, of course, not legally binding.¹⁸² The ephemeral nature of this guidance is evident in its manner of publication. When OSHA has promulgated guidance during the pandemic, and then changed it, records of both versions remain readily available on its website.¹⁸³ The CDC, however, does not keep different versions of guidance on its website; rather, it revises existing guidance without maintaining the original.¹⁸⁴ The difference may have to do with the CDC’s lack of enforcement as to employers, unlike at OSHA, where guidance promulgated by OSHA can be used in such enforcement actions.¹⁸⁵ In other words, by posting the interim guidance on only the CDC’s website, OSHA signaled that it would likely not be relying upon the guidance in enforcement actions because of the difficulty in proving the terms of the guidance at the time of the enforcement action—because the CDC regularly up-

180. Kimberly Kindy, *More Than 200 Meat Plant Workers in the U.S. Have Died Of COVID-19. Federal Regulators Just Issued Two Modest Fines*, WASH. POST, (Sept. 13, 2020), <https://wapo.st/3fNIFbb> [<https://perma.cc/TDQ9-V6ZA>].

181. Jonathan W. Dyal, et al., *COVID-19 Among Workers in Meat and Poultry Processing Facilities? 19 States, April 2020*, 69 MORBIDITY & MORTALITY WKLY. REP. 557, 557–61, (2020).

182. For a discussion of the CDC’s lack of authority in regulating the workplace, see Paula E. Berg, *When the Hazard Is Human: Irrationality, Inequity, and Unintended Consequences in Federal Regulation of Contagion*, 75 WASH. UNIV. L. REV. 1367, 1374–75 (1997) (discussing CDC and OSHA authority).

183. See, e.g., OSHA, *Enforcement Guidance for Recording Cases of Coronavirus Disease 2019 (COVID-19)*, DEP’T OF LAB. (Apr. 10, 2020), <https://bit.ly/3dSTsQK> [<https://perma.cc/JQ5D-CTXP>]; Patrick J. Kapust, *Updated Interim Enforcement Response Plan for Coronavirus Disease 2019 (COVID-19)*, DEP’T OF LAB.: OSHA (May 19, 2020), <https://bit.ly/3echL9> [<https://perma.cc/9W59-A223>] (note two different versions of guidance maintained by OSHA on website).

184. See, e.g., CDC & OSHA, *Meat and Poultry Processing Workers and Employers: Interim Guidance from CDC and the Occupational Safety and Health Administration (OSHA)*, CDC (June 11, 2021), <https://bit.ly/2VdUBvv> [<https://perma.cc/2T2B-NBKZ>].

185. See CDC and OSHA *Issue Guidance for Meat and Poultry Processing Workers and Employers*, OGLETTREE DEAKINS (Apr. 30, 2020), <https://bit.ly/3wpw-syX> [<https://perma.cc/BLD4-P8E5>] (discussing use of OSHA guidance documents in enforcement actions).

dates such guidance. And, indeed, defense-side law firms noted that the guidance is not mandatory and even stated that the guidance “may not be persuasive” to support an OSHA citation based on the general duty clause for violating it.¹⁸⁶

The meatpacking industry is not the only industry in which OSHA appears to have abdicated its authority to the CDC. OSHA’s main COVID-19 webpage contains a link for “Guidance for Specific Industries.”¹⁸⁷ Three industry groups beyond meatpacking have guidance that OSHA notes were “jointly” created with the CDC.¹⁸⁸ All of these interim guidance documents reside on the CDC website, causing the same enforcement issues that are noted above.

Despite this, and despite the obviously unsafe practices discussed above, such as a lack of face masks in the workplace and requiring or encouraging workers to remain at work while sick, OSHA did not cite a single meatpacking plant for violating the general duty clause until September 10, 2020.¹⁸⁹ This is despite the fact that dozens of meatpacking plants had been closed, at least temporarily, much earlier in 2020.¹⁹⁰

To add insult to injury, the amount of the fines in the two instances in which OSHA acted were very small relative to the size of the companies. OSHA fined Smithfield for unsafe practices at its Sioux Falls, South Dakota facility. At that facility alone, nearly 1,300 employees became infected with COVID-19, resulting in the deaths of 4 workers. OSHA levied a fine on Smithfield totaling \$13,494,¹⁹¹ yet Smithfield’s revenue in 2019 was approximately \$14

186. *Id.*

187. OSHA, *Coronavirus Disease (COVID-19)*, DEP’T OF LAB., <https://bit.ly/3hsqiKp> [<https://perma.cc/J5PK-CNEM>] (last visited Aug. 8, 2021).

188. OSHA, *Control and Prevention*, DEP’T OF LAB., <https://bit.ly/36nsXi6> [<https://perma.cc/LFD6-HWLU>] (last visited Aug. 8, 2021).

189. Ximena Bustillo, *U.S. Issues First COVID-19 Fine to Meatpacking Plant Totaling \$13,500*, POLITICO, (Sept. 10, 2020, 4:09 PM), <https://politi.co/3xzxFV4> [<https://perma.cc/AF3D-MS79>]; Vin Gurrieri, *OSHA’s Wave of Virus Fines Fails to Win Over Skeptics*, LAW360 (Sept. 17, 2020, 5:36 PM), <https://bit.ly/3AFSdOv> [<https://perma.cc/39FA-PXTH>] (discussing citations); Alex Gangitano, *Colorado Meatpacking Union Protests ‘Ineffectual’ Federal Fine Amid Coronavirus*, THE HILL (Sept. 16, 2020, 4:59 PM), <https://bit.ly/3hEnARW> [<https://perma.cc/J2X6-Q9Q5>] (discussing the second company fined).

190. There were so many closures that the Meat & Poultry website began a listing of closures along with an interactive map of them in June, 2020. *See Map: COVID-19 Meat Plant Closures*, MEAT + POULTRY (June 23, 2020), <https://bit.ly/3hrHeR1> [<https://perma.cc/9XQX-GBY3>]. Closures began as early as the first week in April. *Id.*

191. Gurrieri, *supra* note 189.

billion.¹⁹² On September 11, 2020, OSHA fined JBS \$15,615 for an unsafe workplace in Greeley, Colorado, yet JBS's revenue in 2019 was over \$51 billion.¹⁹³ At the Greeley plant, 290 workers tested positive for COVID-19 and 6 died.¹⁹⁴ Experts have criticized OSHA for the relatively small fine amounts, with one epidemiologist calling the fines "miniscule,"¹⁹⁵ and the union representing the workers in Colorado stating that the fine was "ineffectual."¹⁹⁶

Not only has OSHA failed to effectively enforce existing standards as to substantive health and safety violations, OSHA has also failed to investigate and enforce existing standards as to whistleblowers who reported violations of these standards and faced retaliation. The Inspector General for the Department of Labor investigated OSHA's handling of these COVID-19 whistleblower complaints and issued a report titled "COVID-19: OSHA Needs to Improve its Handling of Whistleblower Complaints During the Pandemic."¹⁹⁷ The report noted that there had been an increase in whistleblower complaints due to the pandemic and found that OSHA's inspectors were prioritizing the screening of cases, which allowed cases to be closed and removed from OSHA's purview, over investigating them.¹⁹⁸

Another aspect of OSHA's failure to enforce standards is exemplified by OSHA's failure to use programmed inspections as a way to send a message to all employers that they need to take steps to reduce transmission of the virus. As discussed above, programmed inspections reduce injury rates. OSHA could have leveraged this power by announcing an inspection program focusing on transmission of SARS-CoV-2 in the workplace—not just inspections of workplaces where OSHA had received complaints. OSHA issued an Interim Enforcement Response Plan, but that plan focused on prioritizing inspections of workplaces OSHA identified as having a high risk of exposure where there had been complaints of infection risk.¹⁹⁹ As noted above, this was focused on hospitals, emergency care centers, and emergency response facilities.²⁰⁰ Neither the In-

192. Kindy, *supra* note 180.

193. *Id.*

194. *Id.*

195. Gurrieri, *supra* note 189.

196. Gangitano, *supra* note 189.

197. U.S. DEP'T OF LAB., OFF. OF INSPECTOR GEN., COVID-19: OSHA NEEDS TO IMPROVE ITS HANDLING OF WHISTLEBLOWER COMPLAINTS DURING THE PANDEMIC 2 (2020).

198. *Id.* at 8.

199. See KAPUST, *supra* note 168.

200. *Id.*

terim Enforcement Response Plan nor the Updated Interim Enforcement Response Plan for Coronavirus Disease 2019 (COVID-19)²⁰¹ included a plan for conducting programmed inspections focusing on the risk of SARS-CoV-2.²⁰² The failure to create an inspection program for workplaces might have made sense in the early months of the pandemic. However, even in late 2020, OSHA had not released a plan to change its programmed inspection priorities.

In contrast to OSHA, some state OSHA agencies have taken a more proactive approach to policing workplaces for COVID-19-related safety and health infractions. In Nevada, the state agency cited 187 workplaces between March and November 2020 and conducted 2,197 follow-up visits.²⁰³ During a similar time period, from the start of the pandemic until the end of October 2020, OSHA, responsible for nearly half the workplaces in the United States, cited only 112 workplaces for violations relating to COVID-19.²⁰⁴ Furthermore, the aggressive enforcement actions in Nevada appear to have been effective: during follow-up visits conducted by regulators, approximately 96 percent of employers were in compliance.²⁰⁵ Nevada was also proactive in focusing its enforcement efforts where they were most necessary by targeting locations which met CDC indicators of elevated transmission rates for COVID-19.²⁰⁶

III. IMPROVING OSHA'S PANDEMIC RESPONSE: LESSONS LEARNED FROM STATE RESPONSES AND PLANNING FOR THE FUTURE

OSHA could have implemented a host of actions at a national level to protect all American workers. Section II critiqued OSHA's response to the COVID-19 pandemic, and implicit in that analysis were proposals for what OSHA could have done better. Part A of this Section explicitly identifies the core components of an improved response. In the remainder of this Section, I propose struc-

201. See Patrick J. Kapust, *Updated Interim Enforcement Response Plan for Coronavirus Disease 2019 (COVID-19)*, OSHA (May 19, 2020), <https://bit.ly/3yGZWK6> [<https://perma.cc/9XSU-YZGE>].

202. *Id.*

203. Matt Vaughan, *Nevada Businesses Cited for COVID Violations*, ABC 8 (Nov. 23, 2020, 10:27 PM), <https://bit.ly/3qZLrP6> [<https://perma.cc/E739-9JX5>].

204. OSHA, *OSHA News Release, U.S. Department of Labor's OSHA Announces \$1,603,544 In Coronavirus Violations*, U.S. DEP'T OF LAB. (Oct. 23, 2020), <https://bit.ly/3xvwjvr> [<https://perma.cc/2EXZ-VZ3L>].

205. Vaughan, *supra* note 203.

206. NEV. DEP'T OF BUS. & INDUS., DIV. OF INDUS. RELS., *UPDATED NEVADA OSHA ENFORCEMENT PROCESS DURING COVID-19 PANDEMIC* (Nov. 2, 2020), <https://bit.ly/3qXHgU2> [<https://perma.cc/6L54-58B9>].

tural changes to the OSH Act and OSHA to improve the safety and health of workers in the event of another pandemic.

A. Under the Current OSH Act, Managing a Pandemic Response

As discussed in Section II, the circumstances of the COVID-19 pandemic certainly make for a situation in which an emergency temporary standard should at least be considered. While emergency temporary standards have not been used for decades, a pandemic certainly calls for their use. As long as the pandemic poses a significant risk of death or serious bodily injury, the “grave danger” requirement for an emergency temporary standard will be met. OSHA should thus focus primarily on creating a factual record for the workplace safety measures that would be “necessary” to stem the rate of infections occurring in the workplace. Recognizing the potential need for an emergency temporary standard, one of the first actions President Biden undertook after his inauguration was a directive to OSHA to “consider whether any emergency temporary standards on COVID-19, including with respect to masks in the workplace, are necessary,” and to issue any such standards by March 15, 2021.²⁰⁷

In terms of the content of an emergency temporary standard, while it may not have been obvious in January what measures were necessary to prevent infections, it was certainly clear by March or April that masks were a critical component. A very basic emergency temporary standard could have required employers to provide face masks and required workers to wear them when working at an employer’s workplace instead of at home. Employers currently subject to existing standards that were more stringent would be required to adhere to those. For most employers outside of the medical field, required masks would have been made of disposable paper instead of N95 personal protective gear. Employers who were unable to obtain face masks, due to initial shortages, could have been exempted, or could have been provided with governmental assistance to locate and obtain masks.

Imposing a basic mask mandate would have had benefits beyond the obvious reduction in infection rates and potential severity of infections. During mask shortage periods, which is likely to be when infection rates spike and the demand/cost for masks is at its highest, it could have induced some employers to keep workers at home. This would have had the potential to reduce infections during critical periods. In addition, a mask mandate would have had

207. Executive Order 13999, 86 Fed. Reg. 7211 (Jan. 26, 2021).

the potential to reduce mask-wearing animus by normalizing mask-wearing behavior.

Beyond requiring masks, an effective emergency temporary standard in a pandemic needs to require workplace reporting of infections. Throughout the pandemic, OSHA has minimized reporting requirements. This lack of reported information enhances risks to workers and increases the likelihood of outbreaks. The California Occupational Safety and Health Administration (“CAL-OSHA”) provides a blueprint for reporting requirements for COVID-19 exposures in the workplace that OSHA could use. In September 2020, California created new reporting requirements for COVID-19 and gave CAL-OSHA power to close down parts of workplaces with a “risk of infection” “so as to constitute an imminent hazard.”²⁰⁸ The new law notes that existing law was unclear on employer reporting requirements in the COVID-19 pandemic and that tracing and tracking cases is one of the “best tools” for “limiting exposure and minimizing spread” of the disease.²⁰⁹ The law requires that employers provide notice to all employees of any potential exposure to the coronavirus in the workplace, in writing, within one business day of being notified of the exposure.²¹⁰ The written notice must also include information on any COVID-19 related benefits they may have, such as the right to leave, and the employer’s sanitation and safety plans.²¹¹ Furthermore, the employer must provide notice to the local public health agency if the number of cases constitutes an outbreak, as defined by the state Department of Health.²¹² In order to ensure employees would in fact report infections, the law prohibits employers from retaliating against any employee who reports a positive test, positive diagnosis, or order to isolate or quarantine.²¹³

An emergency temporary standard focusing on the most critical aspect of preventing workplace transmission in a pandemic would be ideal because it would be mandatory. However, interim guidance documents serve to reduce risks of infection while emergency temporary standards are being drafted. Furthermore, depending on the nature of the risks of infection posed by future viruses, it may not be feasible for an emergency temporary standard to cover all the behavior that should be undertaken by employers

208. Assemb. B. 685, Reg. Sess. (Cal. 2020).

209. *Id.* § 1.

210. *Id.* § 4.

211. *Id.*

212. *Id.*

213. *Id.*

because of difficulties in proving that all advisable behavior is “necessary.” Thus, an emergency temporary standard could be supplemented by guidance documents.

These guidance documents should address additional ways to protect workers by reducing workplace transmissions of the relevant disease. For example, information about risks posed by different workplaces could be included in a guidance document, while the most critical features to prevent or reduce infection would be contained in the emergency temporary standard. Because guidance documents are non-binding, they would not be subject to court challenges, which allows OSHA greater latitude in promulgating them. These guidance documents should more clearly identify the most critical aspects of stemming workplace infections and steps employers should take to reduce them. As discussed above, current OSHA guidance is unclear, making it difficult for employers to discern the precise steps they should be taking.

Looking beyond guidance documents, OSHA needs to be prepared to shift its enforcement activities in the event of a pandemic. First, OSHA needs to identify the types of workplaces most at risk of outbreaks in a pandemic. These types of workplaces should be a priority for programmed inspections. Second, OSHA should triage and prioritize its reactive inspections based on employee complaints. OSHA’s utter failure with respect to meat-processing facilities illustrates the outcome of failing to take either of the above steps in a pandemic. And while OSHA may have chosen the route of not undertaking in-person inspections due to concerns for its personnel, by doing so OSHA entirely abdicated its responsibility to workers. Just as doctors and nurses still worked to help patients despite risks of contracting COVID-19, OSHA inspectors need to work in person to protect American workers.

These steps provide a template for how OSHA should manage the next pandemic under current law. However, there are structural issues that hamstring OSHA’s ability to be as effective as it could be. These issues mostly require legislative action, such as amendments to the OSH Act, and are discussed below.

B. Revise OSH Act Requirements for Emergency Temporary Standards

Even if the leadership of OSHA under President Trump wanted to promulgate an emergency temporary standard, the problems with drafting an enforceable standard, discussed in Section I, create a significant disincentive for OSHA to take this approach. Thus, even under an administration which was more

proactive in protecting workers, promulgating a viable standard that would survive a court challenge would be challenging.

There are several ways to amend the OSH Act to allow OSHA to create a more effective emergency temporary standard. As it is currently written, the OSH Act requires that there be a “grave danger” to workers and that an emergency temporary standard be “necessary” to reduce the danger.²¹⁴ The word “necessary” is defined as “absolutely needed: required” and “essential.”²¹⁵ The nature of an emergency situation is such that it is unlikely that this type of evidence will be available.

An incremental change would be to replace the word “necessary” with the phrase “reasonably likely to be effective in reducing the risk.” This would place the emphasis of analysis on whether there is a grave danger to workers. It would also make it easier for an emergency temporary standard to be upheld as valid by the courts.²¹⁶ Establishing that a standard is “necessary” is a high hurdle. Indeed, it is sufficiently difficult to meet the requirements for an emergency temporary standard that OSHA has failed to promulgate any since 1983.²¹⁷ Prior to that, OSHA attempted to promulgate emergency temporary standards on a number of occasions, but most of the standards were challenged in court and many were vacated or otherwise blocked from becoming effective.²¹⁸ While courts varied in their reasons for blocking the standards,²¹⁹ a common focus was on the language that the standard be “necessary,” with courts determining that this requirement was not fulfilled.²²⁰

214. 29 U.S.C. § 655(c).

215. *Necessary*, MERRIAM WEBSTER'S DICTIONARY, <https://bit.ly/2UExnOJ> [<https://perma.cc/MGY4-8UGE>] (last visited Aug. 11, 2021).

216. The problems of establishing the requirements for an emergency temporary standard have been recognized for some time. *See, e.g.*, Berg, *supra* note 182 at 1405 n.225 (noting that “it is unlikely that OSHA could ever meet the high standard for issuing an emergency temporary standard for workplace contagion”); Junius C. McElveen, Jr. & Chris Amantea, *Legislating Risk Assessment*, 63 *CIN. L. REV.* 1553, 1564 (1995) (noting possible high standard on scientific evidence required for issuing an emergency temporary standard).

217. *CONG. RSCH. SERV.*, *supra* note 45, at 22.

218. *Id.*

219. *See, e.g.*, *Dry Color Mfrs. Ass'n v. Dep't of Lab.*, 486 F.2d 98, 106, 108 (3d Cir. 1973) (finding that OSHA's “conclusory statement of reasons [for the standard] places too great a burden on interested persons to determine and challenge the basis for the standard” and vacating the emergency temporary standard in part).

220. *See, e.g.*, *Fla. Peach Growers Ass'n v. U. S. Dep't of Lab.*, 489 F.2d 120, 129 (5th Cir. 1974) (“We find no substantial evidence in the record considered as a whole to support the determination by the Secretary that emergency temporary standards were necessary.”); *Asbestos Info. Ass'n/N. Am. v. Occupational Safety & Health Admin.*, 727 F.2d 415, 426 (5th Cir. 1984) (“The Agency has not proved

OSHA needs the latitude to impose short-term requirements that are reasonably likely to reduce the risk of infection to workers based on the evidence available when there is a “grave danger” to workers.

A second step²²¹ that should be taken is loosening or eliminating the requirements for the OSHA permanent standard that will supplant the emergency temporary standard. In order to promulgate an emergency temporary standard, OSHA must immediately undertake the rulemaking process for a permanent standard, which must be created within six months.²²² As is evident from the progression of the pandemic, six months is simply insufficient time for an agency to know what the final rule should be. The scientific information may not be sufficiently established for a rule to be created. Furthermore, vaccines can halt a pandemic, obviating the need for a permanent standard.

There are two ways of dealing with this problem. First, the OSH Act should be amended to specifically allow OSHA to revise the emergency temporary standard in light of new information.²²³ Second, OSHA should have a longer period of time to promulgate the permanent standard, such as a year, given that OSHA’s normal rulemaking process can take years. The Congressional Research Service assessed OSHA’s normal rulemaking process and found that the estimated duration of the rulemaking process is between 52 and 138 months, which is at least 4 years.²²⁴ Outside of this process, the initial steps of preliminary rulemaking activity and developing

that the ETS, OSHA’s most dramatic weapon in its enforcement arsenal, is ‘necessary’ to achieve the projected benefits.”).

221. Changing the “grave danger” portion of the standard is a potential approach as well but does not seem necessary to address pandemics. To be a grave danger, the danger must be a “danger of incurable, permanent, or fatal consequences to workers, as opposed to easily curable and fleeting effects on their health.” *Fla. Peach Growers Ass’n*, 489 F.2d at 132. This standard would be met in the current pandemic given the deadly and long-term consequences of COVID-19. And lowering this portion of the standard would be at odds with the extraordinary nature of the emergency temporary standard, under which there is no notice and comment period available before the standard becomes effective. The standard is properly limited to situations involving a “grave danger,” and the problems of proving that are more effectively addressed by revising the “necessary” portion of the standard.

222. 29 U.S.C. § 655(c).

223. At least one court has indicated that OSHA has the authority to do this already; however, it would be better to codify this since the issue has not been determined by the Supreme Court. *See Fla. Peach Growers Ass’n*, 489 F.2d at 127 (holding that “emergency temporary standards may be amended in the same manner and under the same criteria as govern their initial issuance”).

224. CONG. RSCH. SERV., *supra* note 45, at 4.

the text of the rule take between 24 and 72 months combined.²²⁵ Forcing OSHA to undertake in one year what would normally require between two and six years is virtually impossible. Requiring OSHA to do so in an emergency, such as a pandemic, when the agency needs to be focused on investigating complaints, inspecting workplaces, and assisting employers in their compliance efforts, is completely unrealistic and emphasizes the wrong priorities.

Finally, OSHA should be given the authority to issue emergency temporary standards for a limited period of time without promulgating a final rule on the issue. If, as appears to be the case with COVID-19, a vaccine becomes readily available, there will no longer be any need for masks and social distancing in the workplace. Requiring OSHA to promulgate a final rule that would be rescinded as soon as a vaccine becomes available is a complete waste of time and resources. A more flexible approach would be to revise the OSH Act to create the option for OSHA to establish an initial emergency temporary standard for six months, with the capacity to extend the duration of the standard two or three times.

C. Increase Budget for OSHA Inspectors

A perpetual issue for OSHA is an insufficient number of inspectors. As discussed in Section I.C., the number of OSHA inspectors has remained essentially the same, while the number of workplaces it oversees has grown. This imbalance needs to be corrected. The value of OSHA inspections, to individual workers whose workplaces will be safer, as well as overall to the economy as employers achieve cost reductions due to fewer injuries, should be leveraged by increasing the funding at OSHA for inspectors. The most effective way to ensure that OSHA has ample inspectors is to legislatively tie funding for inspector positions to the number of workers for whom OSHA is responsible. This would reduce the politicization of OSHA's annual budget justifications and help ensure an adequate number of inspectors.

D. Limited Private Right of Action for Employees

Congress should also pass legislation to give employees a private right of action in limited circumstances. Employees who complain about OSHA violations and are retaliated against by their employers should be afforded the right to sue in federal court. Numerous federal statutes contain this whistleblower-type of remedy. Probably the best-known example of this is the Sarbanes-Oxley

225. *Id.*

Act, under which employees who disclose securities fraud committed by companies are protected from retaliation.²²⁶ Federal law now protects whistleblowers who complain about violations of a variety of federal laws, including areas such as consumer products safety,²²⁷ employment discrimination,²²⁸ and public transportation safety.²²⁹

At the present time, employees who complain to OSHA about their employers' OSHA violations can file a complaint with OSHA if they are retaliated against.²³⁰ However, these employees have only the right to an administrative hearing; they have no right to bring suit if OSHA fails to act for years or OSHA decides the claim in favor of the employer. There are dozens of federal statutes that protect whistleblowers with the right to sue in federal court, making it anomalous that employees who disclose violations of federal safety and health laws are left with only a limited administrative remedy. This is especially true given OSHA's lack of enforcement resources discussed above. OSHA cannot effectively investigate the complaints it receives regarding safety and health violations, much less the complaints regarding retaliation by those employees. Furthermore, there is evidence that employees will complain less frequently during a recession due to concerns about losing their job and the difficulty of finding a new one in a recession.²³¹ Creating a federal claim would help encourage these employees to disclose OSHA violations in the workplace without fear of retaliation.

This claim would be a very limited claim. It would not allow all employees who file OSHA violation complaints to sue in federal court. Creating that type of broad claim would be problematic because of the potential conflict with different areas of the law, particularly workers' compensation laws.²³²

226. For a discussion of the development of this law, see NANCY M. MODESITT ET AL., *WHISTLEBLOWING: THE LAW OF RETALIATORY DISCHARGE* ch. 1.III. (3d ed. 2015).

227. 15 U.S.C. § 2087.

228. 42 U.S.C. § 2000e-3.

229. 6 U.S.C. § 1142.

230. 29 U.S.C. § 660.

231. *Maintaining Effective U.S. Labor Standards Enforcement Through the Coronavirus Recession*, WASH. CTR. FOR EQUITABLE GROWTH (Sept. 3, 2020), <https://bit.ly/2TVeMOz> [<https://perma.cc/JD4J-SSPQ>].

232. Assuming that an employee has been injured because the employer failed to correct the safety violation, that employee already has a workers' compensation claim in most instances. Giving an OSHA claim on top of that would interfere with the underlying bargain made in the workers' compensation context, which is that the employer gives up the right to sue in court for the injury in exchange for a near-guarantee of compensation and coverage for health care costs. And, if the employee does not get injured because of the safety violation, then there is no harm to serve as a basis for the claim in federal court.

CONCLUSION

OSHA has utterly failed to protect workers during the COVID-19 pandemic by failing to promulgate an emergency temporary standard, developing guidance that is unclear and ineffective, and failing to proactively and reactively investigate workplaces. Researchers warn that it is only a matter of time until the next pandemic. OSHA's current guidance documents provide an example of what should *not* be done in such a situation, and this Article outlined how to change OSHA's approach. In addition, legislative action needs to be taken now to provide OSHA with the ability to promulgate emergency temporary standards with less risk of them being blocked in the courts and to ensure sufficient funding for OSHA's enforcement branch in the future.
