Protecting Essential Frontline Workers in the U.S. During the Coronavirus Pandemic – OSHA, State Regulation and Implications of Federalism

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This lecture – now an article – is about the COVID-19 pandemic and its impact on the health and safety of essential frontline workers. This larger story includes several important themes: the complexity of state-federal interactions; the variability of state actions to protect workers; the disturbing rigidity of federal administrative law and processes; and our collective failure to protect workers who had to go to work. There is a broader underlying theme as well: The kind of work people do, and the conditions in which they work, are important social determinants of health. The intersections between work and health—and the intersectionality between class and race within this—lie at the center of any discussion of the effects of the pandemic.

At the start of the pandemic, in March 2020, workers quickly fell into three definable groups. First, workplaces shutdown, and about 10 million people immediately lost their jobs in the United States. Many of them worked in low

1. This article is based upon a lecture Professor Spieler delivered on November 3, 2022 as the 129th speaker in the Donahue Lecture Series. The Donahue Lecture Series is a program instituted by the Suffolk University Law Review to commemorate the Honorable Frank J. Donahue, former faculty member, trustee, and treasurer of Suffolk University. The Lecture Series serves as a tribute to Judge Donahue’s accomplishments in encouraging academic excellence at Suffolk University Law School. Each lecture is designed to address contemporary legal issues and expose the Suffolk University community to outstanding authorities in various fields of law.

2. Edwin W. Hadley Professor of Law and Dean Emeritus, Northeastern University School of Law. I would like to thank the entire staff of the Suffolk University Law School Law Review, and especially Kristina Chemareva and Joseph Tower, for assistance in turning this lecture into an article. Thanks, too, to Sarah Basile, Northeastern University School of Law J.D. 2024, for her invaluable research assistance in completing the article.

3. The November 2022 lecture (and this Article) draw upon Emily Spieler, OCCUPATIONAL SAFETY AND HEALTH, ESSENTIAL WORKERS, AND THE COVID-19 PANDEMIC IN THE U.S. - REPORT TO THE INTERNATIONAL LABOUR ORGANIZATION (2023) [hereinafter Spieler, ILO Report]. Available at SSRN: https://ssrn.com/abstract=4426624, and also available on the website of the International Labour Organization (ILO) at https://www.ilo.org/global/publications/working-papers/WCMS_884577/lang--en/index.htm. This Report provides additional information regarding the response to the pandemic in the United States. It was part of a larger comparative project conducted by the International Labour Organization that focused on the occupational safety and health of essential frontline workers during the pandemic. The ILO Project included national reports from Africa (Rwanda); Asia (China, Japan, Republic of Korea); Europe (Italy, Spain, United Kingdom); North America (United States) and South America (Brazil and Colombia). The synthesizing report regarding occupational safety and health, OSH AND THE COVID PANDEMIC: A LEGAL ANALYSIS, is now posted on the ILO website, https://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_871987.pdf, and at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4430132.

4. See Jesse Bennett, Fewer Jobs Have Been Lost in the EU than in the U.S. During the COVID-19 Downturn, PEWRSCH.CTR. (Apr. 15, 2021), https://www.pewresearch.org/fact-tank/2021/04/15/fewer-jobs-have-bee-
wage jobs, particularly in the hospitality and recreation industries that employ large numbers of people of color. Employment dropped about 21% among workers in occupations in which telework was not feasible. Congress moved quickly to offer some financial supports for the newly unemployed, such as expanded unemployment insurance—including extension of coverage to previously excluded workers such as independent contractors—and health benefits under the Affordable Care Act, although these benefits were not available to the many undocumented immigrants who lost their jobs.

Second, there were a lot of jobs that could be done from home, and thus came the Zoom (and Teams) takeover. Those of us who could work from home all remember the remarkable conversion to on-line meetings, teaching, and learning. In general, this occurred in industries that pay higher wages and have lower representation of people of color in the workforce. Overall, 31% of establishments offered increased telework to employees because of the pandemic.

Third, there were the people who were told they had to go to work, irrespective of the risk to themselves or their communities. These last are the people we often call the frontline essential workers, and they are my focus here. They kept our transportation, hospitals, and manufacturing industries running. They worked in meatpacking and poultry processing, prisons, grocery stores, warehouses, nursing homes, and as first responders.

These are industries where people of color—already at heightened risk—are significantly over-represented. About 41% of all essential frontline workers were Black, Hispanic, Asian-American/Pacific Islander (AAPI), or some category other than white. In fact, only one in six Hispanic workers and one in five


8. See Elise Gould & Jori Kandra, Only One in Five Workers Are Working from Home Due to COVID, ECON. POL’Y INST. (June 2, 2021), https://www.epi.org/blog/only-one-in-five-workers-are-working-from-home-due-to-covid-black-and-hispanic-workers-are-less-likely-to-be-able-to-telework/—text-Specifically%2C%20only%20one%20in%20five%20AAPI%20workers%20(39.2%25) [https://perma.cc/5D7C-Y9D9].

9. See Dalton & Groen, supra note 6.


11. See HYE JIN RHO et al., CTR. FOR ECON. & POL’Y RSC., A BASIC DEMOGRAPHIC PROFILE OF WORKERS IN FRONTLINE INDUSTRIES 7 (2020), https://www.eecoc/sites/default/files/2021-04/4-28-21%20M-
Black workers were able to telework due to COVID, compared with one in four white workers and two in five AAPI workers.\textsuperscript{12}

These workers often worked in low wage industries. They took public transportation to work if they were in urban centers, lived in crowded conditions at home, had less access to health care, and were more likely to have co-morbidities.\textsuperscript{13} They were at tremendous risk during the early deadly waves of the pandemic. And this risk was significantly increased by the conditions in which they worked, often in close quarters without adequate ventilation, where social distancing was impossible, or where they were forced to have regular contact with the unmasked public. There were clusters of disease and death among workers in some of these industries, and these workers were vectors for disease in their communities.\textsuperscript{14}

As we all know, we had extraordinary death rates in the United States—far surpassing most other countries—and data and analyses show that workers who could not stay home were overrepresented among those who died in the early period of the pandemic.\textsuperscript{15} This clearly suggests that COVID-19 should be considered an \textit{occupational} risk and not just a community risk that slopped over into workplaces.

A thorough analysis by the National Center for Health Statistics shows that, in 2020, the disease ravaged frontline essential workers.\textsuperscript{16} Workers who did building cleaning and maintenance, construction, farming and fishing, food preparation, provided personal care services, worked in protection, transportation, and warehousing all had significantly elevated rates of death.\textsuperscript{17} In 2023, these findings were echoed in an article in the American Journal of Public Health that concluded that workers in several industries and occupations with public-facing
roles and adults in households with multiple workers had elevated risk of COVID-19.\textsuperscript{18}

Remember the explosion of media coverage of COVID in the meatpacking plants?\textsuperscript{19} Large clusters of cases were present in farms, food processing, and meatpacking. At least 269 meatpacking workers lost their lives to the coronavirus between approximately March 1, 2020, and February 1, 2021.\textsuperscript{20} The workers in these plants were overwhelmingly immigrant workers.\textsuperscript{21}

Overall, according to the Centers for Disease Control and Prevention (CDC), increases in excess deaths led to a decline in life expectancy of 6.6 years for indigenous people, 4.2 years for Hispanic populations, and 4 years for non-Hispanic Black populations—and 2.4 years for the non-Hispanic white population.\textsuperscript{22} The intersections of class, race and work could not be more clear.

Not surprisingly, workers in finance, insurance, and other jobs that could be done safely from home had comparatively lower risk of dying from COVID-19. Zoom saved lives, but it couldn’t save the lives of the frontline essential workers, and it actually increased the disparities across class and racial lines.\textsuperscript{23}

When the pandemic hit, the United States had in place what certainly looked like a strong set of public health and occupational safety laws that should have been adequate to provide protection inside of workplaces as well as in communities. Why didn’t this suffice to protect vulnerable workers?

When occupational safety and health (OSH) issues come to mind, most people think that regulatory intervention comes from the Occupational Safety and Health Act (OSHA) and the Occupational and Health Administration (OSHA). In fact, the OSHA does have expansive language focused on the protection of workers. First, it allows the agency to promulgate regulations (in OSHA

\textsuperscript{18} See Gaffney et al., supra note 15, at 650-53.


parlance these are called standards) to regulate specific hazards that pose a significant risk to workers.\footnote{24}

Second, the statute says: “Each employer \textit{shall} furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.”\footnote{25} This is generally referred to as “the general duty clause.” This general duty is the obligation of every private sector employer and of the federal government for its employees.

Third, OSHA has the power to issue Emergency Temporary Standards (ETS) if “employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards” and if the standard “is necessary to protect employees from such danger.”\footnote{26} These emergency rules become effective immediately without full administrative processes.\footnote{27}

Further, OSHA has broad enforcement powers: the right to enter workplaces to inspect for violations of both standards and the employer’s general duty; to issue citations; and to fine employers that are in violation of the Act.\footnote{28} And, finally, the statute includes whistleblower protections for workers who face retaliation for raising safety concerns.\footnote{29}

But health and safety policy does not play out as expansively or effectively as the statutory language would suggest, for a number of reasons. First, few permanent standards governing health hazards have ever been issued. The development of new rules requires an extraordinarily lengthy and complex process before a final rule can be published. OSHA must do extensive scientific, economic and technological research to justify the need for a rule—a process that can take months or years; then seek approval through agencies outside OSHA; then engage in a public notice and comment period; then respond to all comments, often thousands of them; and then draft a final review that again must be approved by both the Department of Labor and the Office of Information and Regulatory Affairs within the White House.\footnote{30} And every standard that OSHA finally manages to issue is challenged in court, where forum shopping in terms of venue in federal courts means that judges hostile to business regulation often have the first shot at reviewing a rule. In an era when courts are hostile to worker protection, the standard setting process is inevitably long and ultimately contentious. Very few

\begin{itemize}
\item \footnote{24} Occupational Safety and Health Act § 5, 29 U.S.C. § 654(a).
\item \footnote{26} Occupational Safety and Health Act § 6(c), 29 U.S.C. § 655(a).
\item \footnote{27} 29 U.S.C § 655(c).
\item \footnote{28} 29 U.S.C. § 657 (providing for broad inspection powers where work performed).
\item \footnote{29} 29 U.S.C. §660(c) (providing anti-retaliation protection to workers who raise safety concerns).
\end{itemize}
permanent standards have been issued over the years. Other scholars have called this process ossified.31

Notably, OSHA did not have any standard that specifically governed transmission of airborne infectious diseases when the pandemic started. Existing relevant standards—including one that regulates respiratory protection programs—did not apply to many of the hardest hit industries and did not provide broad protections against infectious disease. There had been discussion of development of a standard to address airborne infectious diseases during the Obama administration, but it was never issued.32

Second, the general duty clause is remarkably difficult to enforce. Judicial decisions require OSHA to prove with scientific evidence that there is a substantial risk, that there is a mechanism to address it, and that this intervention is both technologically and economically feasible.33 This is a complex task, requiring the testimony of epidemiologists, engineers and economists. OSHA is reluctant to issue orders (called citations) against employers without having all this proof at hand.

And these aren’t the only barriers to effective enforcement by OSHA.

Our federal law relies on command-and-control top-down enforcement. In most industries, there is no mandate for employers to undertake health and safety reviews of hazards in workplaces and to correct those hazards.34 There is no federal mandate for worker-management committees to work together to address new (or old) hazards.35 And OSHA is simply not staffed or funded to inspect all workplaces. The OSHA inspection force is tiny in comparison to the breadth of the agency’s jurisdiction. The official OSHA website notes that there are fewer than 2,000 inspectors for about eight million worksites—a ratio of over 4,000 worksites per inspector.36 According to the AFL-CIO, in 2020 the number of OSHA inspectors was near its lowest number since the agency was established 50 years earlier.37


34. The exception is that the Mine Safety and Health Act and its regulations do require workplace inspections at the start of each work shift. See 30 C.F.R. § 56.18002 (2019).

35. There are some states where the workers’ compensation statutes require the establishment of joint labor-management committees. See, e.g., WASH. REV. CODE § 41.06.540 (1999).


Even in the best of times, enforcement efforts by OSHA are inevitably weak. Penalties for violations, which are set by statute, are extremely low: A serious violation yields a maximum fine of $15,625 per violation, and the actual penalty may be lower. 38 Citations are often not issued until many months after the on-site inspection, particularly when a health hazard or the general duty clause is involved; the statute allows a six-month period between inspection and the issuance of a citation. 39 As a result, there is a lag after an inspection before the employer is notified of a violation. General duty citations, because of their complexity, are often reviewed by regional and then national staff before being issued. Employers can challenge citations through the administrative appeal process after they are notified. And all through this process, including while any litigation is pending, employers have no legal obligation to abate the hazard in question. 40

Moreover, the whistleblower protections in the OSHA Act are astonishingly weak. 41 Having been enacted in 1970, this section of the law predated later developments in anti-retaliation law. The Act has never been amended to reflect newer understanding of what is needed to provide essential protections to workers. All of these challenges—the lack of a specific standard, the difficulty in issuing new standards, the inadequate administrative resources, the deficient protection for whistleblowers—became painfully obvious during the pandemic. Compounding these weaknesses, you may recall that there was a shortage of PPE (personal protective equipment) in the spring of 2020. 42 There were worker protests and numerous claims of retaliation when health care workers demanded more protection. 43

40. Again, this is in contrast to the Mine Safety and Health Act, which requires abatement during litigation. Mine Safety and Health Act, 30 U.S.C. § 814 (b).
41. See Emily A. Spieler, Whistleblowers and Safety at Work: An Analysis of Section 11(c) of the Occupational Safety and Health Act, 32 ABA J. LAB. & EMP. L. 1, 1 (2016). OSHA Section 11(c) has an extremely short statute of limitations (30 days); a relatively high standard of proof (“but for” rather than “a motivating” or “contributing”); no adjudicative or civil process that the plaintiff can control because cases must be brought in federal court by the Solicitor of Labor.
The problems in 2020 were exacerbated by the federal administration’s desire to keep as many businesses open as possible, combined with a clear reluctance to do much of anything to protect workers. In March 2020, President Trump declared a national emergency and the administration designated workers in sixteen sectors as “essential,” ordering these industries to continue to operate during the pandemic. The focus of these directives was entirely “to help officials and organizations identify essential work functions in order to allow [workers] access to their workplaces during times of community restrictions.” That is—the focus was on getting workers to work, not on keeping workers safe.

The CDC, the primary national public health agency, issued guidelines, including interim guidance for these infrastructure businesses. Notably, despite good science that existed at the time, neither the CDC nor the World Health Organization (WHO) initially treated COVID-19 as an airborne disease that is primarily transmitted through aerosol transmission. This was a hidden but critical failure in the public health sector that dramatically affected how health and safety regulators around the world approached the pandemic.

OSHA’s initial response to the spread of disease inside workplaces was to rely almost entirely on voluntary measures by employers. Early in the pandemic, OSHA issued guidance suggesting “good practices,” but not mandating them; that is, these guidelines were not enforceable as a regulatory matter.

OSHA then divided workplaces into four categories of risk. The “very high” top category focused on health care workers performing aerosol-generating procedures or collecting or handling specimens. The second tier (“high”) included


45. See Identifying Critical Infrastructure During COVID-19, supra note 44.

46. CTRS. FOR DISEASE CONTROL & PREVENTION, IMPLEMENTING SAFETY PRACTICES FOR CRITICAL INFRASTRUCTURE WORKERS WHO MAY HAVE HAD EXPOSURE TO A PERSON WITH SUSPECTED OR CONFIRMED COVID-19: INTERIM GUIDANCE 1 (2020).


health care delivery and support staff who were exposed to patients. All other workers were in the two lower exposure groups, including the sectors and workers where the conditions were dangerous (such as meatpacking) or where workers were regularly exposed to the public (such as grocery stores or transportation).

This categorization was important. OSHA initially announced that it would only use the general duty clause for enforcement in the top two risk categories and only reluctantly expanded later to other hard-hit industries. Overall, there was little intervention by OSHA into federally regulated workplaces in 2020 during the height of the pandemic. Remember that the only option for OSHA to cite non-health care firms was through use of the general duty clause. In 2020, there were only eight inspections of workplaces with food service workers and two of large meatpacking plants. Illustrating these weaknesses, the penalties against two meatpacking companies that were inspected in 2020 totaled roughly $29,000, despite a combined total of at least 12 worker deaths and almost 1,500 infections due to outbreaks at the plants.

A letter from Congressman Clyburn to OSHA noted OSHA’s failures:

For example, on September 8, 2020, OSHA cited Smithfield Foods in Sioux Falls, South Dakota “for failing to protect employees from exposure to the coronavirus.” OSHA concluded that at least 1,294 Smithfield workers contracted the coronavirus, and four employees died. Yet the agency cited the company for just a single violation of the “general duty” of employers to “provide a workplace free from recognized hazards that can cause death or serious harm” and fined the company only $13,494.

Although OSHA’s citation identified four distinct actions Smithfield failed to take to protect its workers, the agency lumped them together as a single violation and declined to classify the conduct as “willful”—decisions that reduced a potential $2.7 million penalty down to just a few thousand dollars. OSHA’s paltry fine, amounting to less than $11 per employee infected with the virus and under $3,400 per employee who died, is unlikely to spur better worker safety at a company as large as Smithfield, which paid its Chief Executive Officer $14 million last year.

50. Id. at 19.
51. Id. at 20.
54. See id. (showing Smithfield Packaged Meats Corporation and JBS Foods, Inc.).
Meanwhile, faced with local public health decisions to close some meatpacking plants, President Trump invoked the Defense Production Act (DPA) to order these plants to remain open, classifying the plants as critical infrastructure without regard for worker health and safety. 56 Although the DPA order was never fully enforced, meatpacking companies attempted to rely on this order as a defense to individual litigation that has been brought against these companies over workers’ deaths. 57 No attempt to develop an emergency rule was made by OSHA in 2020.

Soon after he was inaugurated in January 2021, President Biden issued an expansive “Executive Order on Protecting Worker Health and Safety,” specifically calling attention to essential workers, workplace exposures, and the need for protections. 58 He called on OSHA to issue revised guidance for employers on workplace safety, to consider issuing an ETS to address the spread of COVID-19 through occupational exposures, and to review OSHA’s enforcement efforts “related to COVID-19 on violations that put the largest number of workers at serious risk or are contrary to anti-retaliation principles.” 59

At this point we presumably had a federal administration committed to doing something. What happened? This brings us to the part of the story that is not about bad intentions but instead illustrates the sclerotic nature of federal administrative and regulatory law. And this also brings us to the part of the story that raises the specter of Supreme Court antipathy to protective federal legislation.

In June 2021, months later than initially promised, OSHA did issue an Emergency Temporary Standard for COVID-19, but it was limited to healthcare facilities — and thus did not provide any protection for workers in other affected industries, including meatpacking, prisons, and all public facing workplaces. 60 The ETS required health care employers to conduct workplace-specific hazard assessments to identify potential workplace hazards related to COVID-19, to seek the input and involvement of non-managerial employees and their representatives, and to monitor each workplace to ensure the ongoing effectiveness of the COVID-19 plan. 61 Notably, the provisions regarding ventilation only required employers to ensure that existing ventilation systems be working in accordance


57. See e.g., Buljic v. Tyson Foods, Inc., 22 F.4th 730, 734, 740 (8th Cir. 2021), cert. denied (U.S. Feb. 21, 2023) (No. 22-70); Glenn v. Tyson Foods, Inc., 40 F.4th 230 (5th Cir. 2022), cert. denied (U.S. Feb. 21, 2023) (No. 22-455). In the end, no court endorsed this argument. For further discussion of these cases, see Spieler, ILO REPORT, supra note 3, at 66-67. The ultimate issue regarding employer liability has not been resolved in most of these cases.


59. Id.


61. 29 C.F.R. §1910.502(c) (withdrawn December 27, 2021).
with manufacturer’s instructions, that the amount of outside air circulated through the system be maximized “to the extent appropriate,” and specifically noted that new ventilation systems were not required.62 That is, this ETS did not set any minimum requirement for ventilation, nor did it define “the extent appropriate.”63 A broader standard, to cover all workers, had been in development that spring; the administration had taken comments from stakeholders for several weeks but then decided not to issue it, without explanation.64 In the end, this federal health care ETS was weak—weaker than what had been initially proposed in the broader standard, and considerably weaker than rules that were being developed by some states, including California,65 Oregon,66 Washington,67 and Michigan.68

In early November 2021, OSHA issued a second emergency standard, the COVID-19 Vaccination and Testing ETS, mandating vaccinate-or-test programs for all employers with 100 employees or more, potentially reaching many essential workers in all sectors.69 This standard allowed employers to permit any employee who resisted vaccination, irrespective of the reason, to do regular testing for the virus instead: that is, it was not a blanket vaccine mandate.

What happened to these two attempts at emergency regulation?

The health care ETS was enforced for six months, but then withdrawn in December 2021.70 The OSHAAct statutory provisions are ambiguous, either suggesting that an ETS cannot be in place for longer than six months, or suggesting that it should be in place until replaced by a permanent standard.71 A permanent standard was not ready to be issued at the close of the six-month period, and the agency chose to withdraw the ETS while it continued to work on the permanent standard for health care.72 On January 5, 2022, National Nurses United and other unions filed a mandamus petition in the D.C. Circuit Court of Appeals, asking the federal court to order OSHA to issue a permanent health care standard within 30 days of the granting of the writ, and to enforce the healthcare temporary standard until it was “properly
superseded” by a permanent standard. 73 Eight months later, on August 26, 2022, the court dismissed the petition, holding that OSHA had (and has) no clear duty to issue a permanent standard. 74 As of summer 2023, a permanent standard had still not been issued—eighteen months after the ETS was withdrawn.

As for the vaccinate-or-test mandate, legal challenges were filed in all but one Circuit Court of Appeals in the country immediately after the ETS was issued. 75 These progressed rapidly through the judicial system, culminating on January 13, 2022, in a Supreme Court per curiam decision granting—despite vociferous dissent—a permanent stay on implementation of the rule. 76 The case that reached the Supreme Court had been brought by the National Federation of Independent Businesses (NFIB), an organization that consistently opposes regulatory restrictions on private enterprise. 77

The majority decision mischaracterized the requirement as a vaccine mandate, failing to acknowledge the scope of the right of workers to refuse vaccination. The court ruled that OSHA had gone beyond its statutory authority in issuing the rule, distinguishing between workplace health (which is within OSHA’s purview) and general public health (which is not). 78 In essence, the court drew an imaginary line between what it considered “public health” and what it considered “occupational health.” 79 The majority opinion also raised the twin specters of the nondelegation and the major questions doctrines. 80 In fact, the vaccinate-or-test mandate as it was drawn was overbroad—by including all workers of employers of a particular size, irrespective of whether they were encountering increased risk. And it was too

74. In re Nat’l Nurses United, 47 F.4th 746, 754 (D.C. Cir. 2022).
77. For example, according to the NFIB website, “[u]nnecessary regulation is a perennial cause of concern for NFIB’s members and is particularly burdensome on small businesses, which lack the resources and personnel to keep up with new rules. According to NFIB’s monthly Small Business Economic Trends survey, ‘unreasonable government regulations’ ranks as a top problem. Unfortunately, the regulatory burden on small business has continued to grow for decades. Congress and the administration must curtail costly regulations that disproportionately affect small businesses. Reforming the regulatory process is one of NFIB’s top legislative priorities.’ See Regulations, NFIB, https://www.nfib.com/advocacy/regulations/ [https://perma.cc/3LD9-GWY6].
79. Id. at 666.
80. Id. at 668.
narrow—by excluding employers with fewer than 100 employees, even if their workers were at significantly increased risk. It is not surprising that it was vulnerable to attack.

But, despite a lot of adverse publicity about the decision in NFIB v. OSHA, the Supreme Court did leave open the possibility of a narrower rule that would address the problem in workplaces where there was proof of significantly increased risk:

Where the virus poses a special danger because of the particular features of an employee’s job or workplace, targeted regulations are plainly permissible. We do not doubt, for example, that OSHA could regulate researchers who work with the COVID–19 virus. So too could OSHA regulate risks associated with working in particularly crowded or cramped environments. But the danger present in such workplaces differs in both degree and kind from the everyday risk of contracting COVID–19 that all face. OSHA’s indiscriminate approach fails to account for this crucial distinction—between occupational risk and risk more generally—and accordingly the mandate takes on the character of a general public health measure, rather than an “occupational safety or health standard.” 29 U. S. C. §655(b).

In response to the decision, OSHA formally withdrew the vaccine-or-test ETS. There is no indication that the agency has given any consideration to issuing a more targeted rule governing vaccines and testing.

Perhaps more importantly, this means that starting at the end of 2021 there were no pandemic-specific federal OSHA standards in effect for any essential sectors or critical workers. As of late 2022, OSHA was relying on a special focus enforcement program in health care institutions and was continuing to work on the development of a new permanent standard regarding airborne infectious disease transmission. A more general infectious disease standard is now on OSHA’s 2023 regulatory agenda; a proposed rule has not yet been issued, and because of its complexity it is unlikely to be issued anytime soon. OSHA also tried to improve enforcement activities, and the number of inspections and citations regarding the virus increased, but the number of general duty citations in industries outside of health care remained low. We are pretty much back to where we were in March 2020, except we have well-intentioned people in leadership positions in the Department of Labor, trying to do better.

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The failures of the federal administration in this realm mean that it was essential to turn to state and local law, as has happened in other domains.\textsuperscript{85} As we move into an era when the Supreme Court is clearly antagonistic to the federal administrative state, the powers of local and state governments—and the limitations on those powers—loom large.

The OSHA regulatory framework—and the way that it intersects with state law—is different and more complicated than other federal laws governing employment. It is not broadly preemptive (as are both the NLRA\textsuperscript{86} and ERISA\textsuperscript{87}), nor does it simply allow states to enact parallel statutes and enforcement (as do Title VII\textsuperscript{88} and the Mine Safety and Health Act\textsuperscript{89}). Instead, the OSHA involves a complex intertwining of federal and state regulatory approaches.\textsuperscript{90}

First, a significant gap: OSHA provides no protection to state, county and municipal workers at all.\textsuperscript{91} It is up to each state whether to have occupational safety and health (OSH) laws protecting these workers. In many states, this has meant that public sector workers in essential industries with high rates of injury and disease—from health care to transportation to corrections to construction—have no OSH protection from any hazards, including the virus.

Second, states have a lot of discretion in how they can choose to regulate workplace health and safety.\textsuperscript{92} Some states—called state plan states—are approved to take over all health and safety regulation.\textsuperscript{93} These states must extend protections to their public sector workers; they must enact regulations that are at least as protective as the federal rules; and they receive federal funds as they undertake this role. Twenty-two states and territories have done this,\textsuperscript{94} and some have far more protective rules for workers than federal OSHA does. For

\textsuperscript{85} Such as the aftermath of Dobbs v. Jackson Women’s Health Org., 142 S. Ct. 2228 (2022) (overturning Roe v. Wade, 410 U.S. 113 (1973) and turning issues of abortion access over to individual states).


\textsuperscript{87} Employee Retirement Income Security Act of 1974, 29 U.S.C. $1144(a)$ (“the provisions of this subchapter and subchapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan”).

\textsuperscript{88} 42 U.S.C. § 2000e-7 (“Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.”).

\textsuperscript{89} Mine Safety and Health Act, 30 USCA § 955 (a) (“No State law in effect on December 30, 1969 or which may become effective thereafter shall be superseded by any provision of this chapter or order issued or any mandatory health or safety standard, except insofar as such State law is in conflict with this chapter or with any order issued or any mandatory health or safety standard.”).

\textsuperscript{90} See Occupational Safety and Health Act, 29 U.S.C.A. §667.

\textsuperscript{91} See Occupational Safety and Health Act, 29 U.S.C. § 667(a).

\textsuperscript{92} See Occupational Safety and Health Act, 29 U.S.C. §§ 667(a)-(h).


\textsuperscript{94} See id.
jurisdictions that have expanded protections for workers beyond the federal guarantees, it is worth looking at California as a good example.95 There are also six states that have approved plans to cover only their public sector workers; Massachusetts, which I address below in more detail, is one of these states.96

But federal OSHA only preempts the right of states to enact legislation if there is a specific regulation covering a risk.97 Thus, if there is an existing federal standard, state OSHA plans must follow it or enact a more protective rule, but a state without an approved state plan cannot enact any enforceable legislation or rule governing the specific risk. For example, OSHA has a standard that regulates exposure to silica dust.98 A state with an approved state plan must follow this rule or enact something more protective. A state without an approved state plan may not, because of this preemptive effect, enforce any rule governing this risk.

On the other hand, if federal OSHA has no specific rule governing a risk, and even though OSHA can fall back on the general duty clause, every state is free to legislate or regulate exposure to that hazard, whether or not the state has an approved state plan. For example, OSHA has no standard governing exposure to either indoor or outdoor heat. All states may enact laws or regulations that protect workers from the consequences of excessive heat exposure.

Remember that at the beginning of the pandemic, OSHA had no rule at all that generally governed exposure to airborne infectious disease in any workplace.99 Any state—with or without an approved state plan—could therefore step into this void and regulate this exposure. For the limited time that the healthcare ETS was in effect, states with state plans were required to follow it, at least theoretically. States without approved state plans could not regulate exposure to the virus in this one industry, but only for the period of time that the ETS was in effect.

In other words, every state had considerable power to protect vulnerable frontline essential workers during the pandemic. The extent to which states exercised this power depended on two critical variables. First, was it a state plan state? These states had existing established infrastructure for occupational safety and

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96. See State Plans, supra note 93.


99. There were existing rules governing a range of issues relevant to the pandemic, including use of personal protective equipment (29 C.F.R. § 1910.132 (2016)), respiratory protection (29 C.F.R. § 1910.134 (2019)) and sanitation (29 C.F.R. § 1910.141 (2011)). Although these rules were not specifically directed at exposures to infectious diseases, they did provide some protections against the risk.
health (OSH) enforcement as well as the expertise to develop rules. Second, what was the level of political will to act quickly and effectively to protect workers?

For example, among states with approved state plans, California stands out as a place that used all of its powers to address the pandemic. Entering 2020, California had an existing standard governing workplace exposure to infectious diseases. The state then issued an emergency standard specifically focused on COVID-19 exposures, created legal presumptions to assist infected workers to receive workers’ compensation, and posted comprehensive data on its websites regarding both COVID-related enforcement activities and compensation claims. In contrast, Arizona—also a state plan state—did nothing to address the risks in workplaces. In fact, Arizona refused to follow the requirement that all state plan states adopt any standard, including an emergency standard, to retain federal approval. That is, state plan status and the infrastructure that accompanies this status were not enough to guarantee worker protections. OSHA responded to Arizona’s actions by threatening to remove the state’s approved state plan status, along with the federal monies that come with that status.

States that did not have approved state plan, and that also lacked the political will to address the pandemic, simply waited for federal OSHA to show up and did nothing to protect workers beyond what OSHA offered—which was, as we have seen, very limited. Some of these states also challenged the right of OSHA to enforce the vaccinate-or-test mandate, as well as restricting the availability of federal benefits that were available nationwide. Mississippi is among the states in this category.

100. See CAL. CODE REGS. tit. 8 § 5199 (2013); CAL. CODE REGS. tit. 8 § 3203 (2020).
105. See e.g., Petition for Review, Florida v. OSHA, No. 21-13866 (11th Cir. Nov. 5, 2021).
106. See Complaint, Louisiana v. Biden, No. 1:21-cv-03867 (W.D. La. Nov. 4, 2021) (listing Mississippi as one of plaintiffs); see also Spieler, ILO REPORT, supra note 3, at 54-56 (describing pandemic response in Mississippi).
This brings us to the Commonwealth of Massachusetts, which I promised would be a focus of this lecture. The Commonwealth does not have an approved OSHA state plan for the private sector and, in general, the state has left health and safety issues for workers in the private sector (and the federal public sector) to federal OSHA.106 But in the absence of any federal OSHA standard, the state was free to regulate COVID-19 as a workplace hazard even though the state remained within federal OSHA’s enforcement territory. In fact, there is remarkably strong legal authority for the Massachusetts government to establish workplace safety interventions.

First, Massachusetts now explicitly provides OSH protection to state, county and municipal workers.107 In mid-2022, the state received approval from OSHA for its public sector state plan.108 This means, at a minimum, that the Commonwealth must extend protections to these workers that are at least as protective as the federal protections—including both specific regulations and the general duty of employers. In return, the state will be receiving federal funds to assist in enforcing these protections.109

There is also quite a lot of other statutory language that grants power to state agencies and to the Attorney General to address outbreaks of infectious diseases, including within workplaces. For example, statutory language mandates the Department of Labor Standards (DLS) to determine reasonable requirements for the prevention of occupational diseases in places of employment.110 The Attorney General (AG) also has these powers, though the statute makes any action by the Attorney General discretionary.111 The statutory language governing the Department of Public Health (DPH) and local boards of health gives them broad authority to address an infectious disease emergency, including providing for investigations, issuance of regulations, requiring notice of infections, and using “all possible care to prevent the spread of the infection.”112

There is also a right to a safe workplace embedded in Massachusetts common law. This common law right was established before the passage of the workers’ compensation law a century ago.113 Of course, tort actions would now largely be precluded by the workers’ compensation law’s exclusivity provisions. But the right to a safe workplace has never been contradicted in case law, and this

106. See State Plans, supra note 93; see also Spieler, ILO REPORT, supra note 3, at 51-54 (describing pandemic response in Massachusetts).
109. See id.
113. See Fraioli v. New York, 190 N.E. 605, 606 (1934) (noting “[t]he employer is bound to furnish a reasonably safe place for his employees to work,” in a case in which the employer had not purchased workers’ compensation insurance and therefore was not protected by workers’ compensation exclusivity, and citing earlier cases for the same principle).
would leave open the possibility of lawsuits for injunctive relief against workplace hazards.

Clearly, adequate legal powers existed in Massachusetts to move quickly to address the spreading crisis for frontline essential workers in the spring of 2020. But the Commonwealth was not poised to undertake any significant interventions that would protect workers at risk in any sector when the pandemic began. There was no infrastructure to address a problem of the scope of the pandemic; not enough expertise, not enough staff, and perhaps not the political will to deal fully with the hazard of exposures in workplaces and clusters of disease that confronted us starting in the early spring of 2020.

In March 2020, Governor Baker issued a series of COVID-related emergency public health orders that urged a long list of essential “brick and mortar” businesses to stay open.114 Like the federal orders, these orders required compliance with CDC guidance but were not focused on workplace health and safety or the needs of workers who were required to go to work in these establishments.115

Unions and advocacy organizations, including the Massachusetts Coalition for Occupational Safety and Health (MassCOSH) with which I work closely, pressured for more workplace-specific protections. DLS was, at best, sluggish in response to its mandate, and workers and advocates initially focused on working with local boards of health. Pressure mounted on these local boards—some of which have only one employee—to act. There are more than 300 local boards of health in Massachusetts, and most of them were not prepared to meet the kind of challenges that came in the first half of 2020.116

But some did act. For example, in the town of New Bedford, which has a relatively large seafood processing industry, the local board of health posted a wide range of information, issued a series of emergency orders, and ordered some facilities to shut down to disinfect due to COVID-19 cases.117

While DLS was initially not using its authority to act, MassCOSH and others advocated that the Attorney General (AG) take more aggressive action, given that she clearly had the necessary statutory powers and had demonstrated ongoing concern for vulnerable workers in the Fair Labor Division of her office.118

In the absence of quick action from the executive branch, the AG established a

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115. See Order No. 13, supra note 114.
Health and Safety Task Force. Complaints about both safety and retaliation mushroomed, and the new task force stepped up to address many of these complaints. By the end of August 2020, they had handled 3692 COVID-related workplace health and safety matters.

Meanwhile, DLS issued a COVID-19 Workplace Safety regulation in mid-2020, and began to undertake enforcement. The regulation covered “[a]ny person providing paid or unpaid service to an enterprise at a brick-and-mortar premises including, but not limited to, any employee, contract worker, volunteer, temporary employee, or worker,” and incorporated by reference all orders issued by the governor that were sector-specific. Exempted from coverage under the rule were the courts, correction facilities, childcare facilities, and pre-college educational institutions.

There were several notable aspects of this regulation. First, it extended beyond the regular employment relationship to include protection for everyone, paid or unpaid, who provided services within a facility. On the other hand, the rule excluded important sectors, like prisons, where the pandemic was raging, and K-12 education, where the tension between protection of the workers and the needs of students made issues even more fraught.

DLS then had the legal tools to address many workers’ concerns. But with a very small staff, the agency still had a hard time responding to concerns and engaging in aggressive enforcement. Ultimately, only 173 written warnings were issued against essential businesses under the regulation. And then, when the pandemic was far from over—and over the angry objections of dozens of public health experts, unions and other worker advocacy organizations—DLS announced that it would rescind the rule in July 2021. No new rule replaced it, despite the subsequent surges in infection rates.

Moreover, DLS is also responsible for enforcing the relatively new public sector Massachusetts health and safety law. As noted above, under the terms of the federal-state agreement, all standards issued by OSHA are supposed to be adopted and enforced by DLS for the public sector. But DLS disputed their obligation to follow the federal emergency standards, despite the fact that people had died in the public sector.

120. See Email from Jodi Sugarman-Brozan, Executive Director, Mass. Coal. Occupational Safety & Health member, DLS Advisory Committee to author (Mar. 15, 2022) (providing data regarding complaints to Attorney General).
122. Id.
123. Id.
124. Id.
125. 454 Mass. Code Regs. 31.00.
126. See Sugarman-Brozan, supra note 120.
Where does that leave us in Massachusetts? Now, of course, there are no specific COVID-related federal standards in effect. And there is no rule under Massachusetts law, for either the public or the private sector, that provides protections from workplace exposures to COVID-19 or any other infectious disease. DLS will be required in the future to adopt any new OSHA rule for the public sector workforce, including pandemic-related rules, in order to retain state plan status (and the funding that goes with it). MassCOSH and the public sector unions will be tracking DLS compliance and trying to get increased funding to improve the in-state infrastructure for workplace health and safety.

Common law rights to a safe workplace in Massachusetts have not been tested during the pandemic (or at least there are no cases that have been reported). There is fascinating and creative litigation in other states, drawing on similar common law principles and on public nuisance doctrine, seeking injunctions to force employers to provide appropriate protection in workplaces.\footnote{See, e.g., Rural Cnty. Workers All. v. Smithfield Foods, Inc., 459 F.Supp.3d 1228, 1232 (W.D. Mo. 2020); Requena v. Pilgrim’s Pride Corp., No. 9:20-CV-00147-ZHJ, 2021 WL 2099312, at *1 (E.D. Tex. Apr. 1, 2021). For additional examples, see Spier, ILO REPORT, supra note 3, at 58–61.}

to comport with the convention, we take the opposite approach; we look first to
domestic law as the foundation and only ratify if there is no conflict.

Leaving aside a fundamental antipathy to international law and regulation that
often seems to pervade U.S. law, we have not ratified the health and safety con-
ventions because they are not consistent with law and practice in the United
States in important—and troubling—ways. The ILO conventions require
broader and deeper protections than are provided to workers here. In particular,
we fail to extend OSH protections to all workers, most notably state and local
public employees; U.S. protections for workers who refuse dangerous work, or
protest retaliation, or are subjected to harassment or bullying are relatively weak;
there is less protection for workers’ voices at the enterprise level to assure safe
workplaces; there is no U.S. guarantee regarding provision of mental health and
occupational health services; with the exception of workplaces covered by the
Mine Safety and Health Act, there is no federal requirement that employers un-
dertake regular review and correction of workplace hazards without direct regu-
laratory intervention.

Perhaps most importantly, the ILO assumes that there should be available
mechanisms for cooperation between workers and management—what they call
social dialogue—at both the regulatory and the enterprise level.132 Unions, of
course, have the right to bargain over workplace safety; it is a mandatory subject
of bargaining under the National Labor Relations Act.133 But with the extrao-
dinary decline of unions—as of 2022, only 6% of the private sector workforce
was represented by unions—we cannot claim to comply with the ILO require-
ments.134 In fact, the United States may be the only industrialized country with-
out a requirement for joint management labor safety committees in all enter-
prises, unionized or not. The ILO assumes a dynamic process involving
employers and workers. We in the United States do not.

The broader protections mandated by ILO Conventions might have served
workers, and their families and communities, well during the pandemic. At the
federal level, no progress has been made toward incorporating these norms into
our statutory or regulatory framework.

But states can—and sometimes do—embrace these ideas. California, for ex-
ample, has used its authority under its state plan to require employers to have

132. See e.g., ILO Convention 144: Tripartite Consultation (International Labour Standards) Convention,
UMENT_ID:312289:NO; Recommendation 94: Co-operation at the Level of the Undertaking Recommenda-
UMENT_ID:312432; Recommendation 113: Consultation (Industrial and National Levels) Recommendation,
UMENT_ID:312451:NO.


134. See Union Members Summary, BUREAU OF LAB. STATS. (Jan. 19, 2023), https://www.bls.gov/news.re-
lease/unions2.nr0.htm [https://perma.cc/2NCD-Z4AG]; Int’l Labour Org., Freedom of Association and Protection
of the Rights to Organize Convention, No. 87 (1948).
developed internal health and safety policies and programs that must adapt to hazards as they are identified.\textsuperscript{135} The state of Washington requires that workplaces have joint management-worker safety committees.\textsuperscript{136} A full review of state plans reveals states with strong protections against retaliation, better enforcement protocols, more involvement of workers, and other protections that are absent at the federal level. This suggests that Massachusetts can also expand worker protections—and that international norms may help in imagining a more progressive regulatory structure within the state.

In summing up, I would like to make three points. First, a failure of federal leadership means that we must depend on the states, and states are incredibly variable in both their willingness and their ability to respond. Without real OSH infrastructure, states like Massachusetts may have good enabling legislation but nevertheless fail to act consistently and effectively. Even with state plans, regulatory development and enforcement is politically dependent on state leadership. As a result, U.S. workers have a huge variation in protections from one jurisdiction to the next. Where someone lives may determine whether they come home safe and healthy after a day at work.

Second, it is worth thinking about what Massachusetts can do. Should Massachusetts expand its focus on workplace safety? Think about the risks for which federal OSHA lacks standards. We could have laws limiting exposures to deadly risks like heat for construction workers and farm workers. Or requiring more worker and union participation at the workplace and enterprise level. Or providing better protection against retaliation for workers who come forward with reports of injuries. Can we do this? Should we do it? Inevitably, this is a political discussion about priorities and resources.

Third, international norms suggest that even our basic structure is weak. We need to look at what the ILO Conventions suggest we should do to strengthen our OSH legal regime. These might include, for example, better protection of worker voice, continuous monitoring of hazards by employers and by enterprise-level joint worker-management committees, provision of occupational health services, and expanded interventions regarding harassment and bullying. It is a long list, but one that is worthy of our attention.

In conclusion, we must acknowledge that the United States failed frontline essential workers during the pandemic, and this contributed to the appalling rate of disease and death in this country. The pandemic may not be over.\textsuperscript{137} We need to think about how we can bring together the concentric circles of international directives, and federal, state and local public health and workplace health and safety powers to protect vulnerable workers.

\textsuperscript{135} See CAL. CODE REGS. tit. 8 § 3203 (2020).
\textsuperscript{136} See WASH. ADMIN. CODE § 296-800-130 (2018).
\textsuperscript{137} At least this was certainly true on November 3, 2022, when this lecture was delivered. Perhaps it will remain true when this article is published.
A friend of mine teaches a class that addresses this question: Why is it so hard to do the right thing when we know what needs to be done? This is a core question about OSHA, which has failed to regulate numerous well-known workplace hazards. In fact, OSHA is caught in a bind, even with leadership that is dedicated to helping workers. From the outside, what we see is OSHA, plodding along, too slowly. From the inside what they see is frenetic activity and delays caused by bureaucratic reviews and unsympathetic courts.

Sadly, it is hard to be optimistic that this will get better. The majority on the Supreme Court seems poised to attempt to dismantle the administrative state. As of the time of this writing, OSHA has not issued any permanent rule governing transmission of COVID-19—nor has it proposed a standard to address the workplace transmission of infectious diseases more generally.

The failure of the federal regulatory regime means that the protection of vulnerable workers falls to the states, and the ability of states to respond depends on multiple factors: where each state fits within the complex design of occupational safety and health law; the extent to which local law empowers state actors; the funding, expertise, and commitment of the local administrative agencies; and the broader political commitment to protect workers. Looking locally, Massachusetts now has a clear legal duty to provide effective protection to public sector workers. But there has not been any indication of interest in expanding these protections to all workers by adopting a fully protective state-approved OSHA plan—or by adopting legislation or regulations to protect workers from hazards unregulated by OSHA. The resources in DLS, DPH, and the Attorney General’s Office are currently inadequate to meet the next health and safety crisis.

We can do better. In Massachusetts, pressure for better workplace protections will continue from advocacy groups, unions, coalitions of low wage workers and workers’ centers, and lawyers who work closely with these groups. But the fundamental question remains: How well prepared will we be for the next workplace safety crisis?