

# Protecting Workers that Provide Essential Services

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**SUMMARY.** States and localities, which retain the right to protect the health and safety of their citizens, have designated more than 55 million Americans as “essential workers” during the COVID-19 pandemic. Most essential workers are employed in health care (30%) and in food and agricultural (21%) (McNicholas & Poydock, 2020). A majority (76%) of all essential health care workers are women, while half of all essential food and agricultural workers are racial and ethnic minorities. Consequently, many women and racial and ethnic minorities are unable to shelter at home or socially distance themselves because they are deemed “essential workers” (Yearby & Mohapatra, 2020). Even though these workers are deemed “essential workers,” they have not been provided with the employment and safety protections (e.g., paid sick leave, health insurance, and workers’ compensation) that are essential to keeping them and their families healthy and safe. To address the lack of economic protections, which is discussed in more detail in Chapter 28, essential workers should be provided with a guaranteed basic income, paid sick leave, health insurance coverage, and survivorship benefits regardless of their worker and/or immigration status (Yearby & Mohapatra, 2020). To keep workers from being killed or otherwise harmed at work, the government (federal and state) must issue mandatory health and safety laws and regulations that are aggressively enforced to prevent workplace COVID-19 infections and deaths. Finally, to ensure that essential workers and their families do not suffer financially if they contract COVID-19, the government (federal and state) and businesses should be financially responsible for the harm caused as a result of a worker’s COVID-19 infection or death.

## Introduction

Most essential workers (51%) are employed in hospitals, long-term care facilities, meat and poultry processing facilities, and farms, which have been hotspots for COVID-19 infections. Yet, these workplaces were not safe even prior to COVID-19. For example, “in 2017 meatpacking workers were nearly twice as likely to suffer an injury and more than 15-times as likely to suffer an occupational illness than the average private sector worker – the second-highest rate of occupational illness among all US industries” (Human Rights Watch, 2019). Agriculture workers also suffer exposure to mold and numerous work-related injuries, including musculoskeletal disorders, eye damage, respiratory conditions, heat stress, and acute and chronic poisoning from pesticides (Schoch-Spana et al., 2010). The additional threat of contracting COVID-19 in the workplace has exacerbated these disparities in workplace injuries.

As of July 27, 2020, more than 113,731 health care personnel have tested positive for COVID-19 and 576 have died (CDC, 2020), while over 31,000 food and agricultural workers have tested positive for COVID-19 and 101 have died (Held, 2020). A majority of the workers in hospitals, long-term care facilities, meat and poultry processing facilities, and farms are women and racial and ethnic minorities who live in poverty and do not have paid sick time. For example,

agricultural workers live below the poverty level, do not have paid sick leave, and tend to be immigrants from countries such as Mexico, Central America, and the Caribbean who work in 42 of the 50 states, including California, Illinois, Texas, and Washington (Schoch-Spana et al., 2010).

Direct care workers are primarily women of color (59%), live in poverty (18%), rely on some form of public assistance including food stamps and Medicaid (53%), and do not have paid sick leave (The Commonwealth Fund, 2020). Moreover, 51.5% of those who are considered frontline meatpacking workers are immigrants, compared with 17% of all workers in the United States. Since women and racial and ethnic minorities make up the majority of these workers, they have been disproportionately harmed by COVID-19 (Yearby & Mohapatra, 2020). This is in part a result of agency understaffing.

Under the Trump administration, the number of Occupational Safety and Health Administration (OSHA) inspectors charged with protecting the health and safety of a majority of workers has been at the lowest recorded level since 1975, and 42% of OSHA’s top leadership positions remain unfilled (Held, 2020). Due to this understaffing, OSHA has conducted 5,000 fewer inspections per year than during the Obama and Bush administrations.

Furthermore, although most workers’ compensation laws do not cover infectious disease, many states have enacted business liability shield laws that limit workers’ ability to sue their employers for workplace harms related to the COVID-19 pandemic. Consequently, many essential workers are not receiving the protections they need to stay safe and healthy during the COVID-19 pandemic. This report identifies and examines the major problems with the government’s response to protecting the health and safety of essential workers during the COVID-19 pandemic and provides recommendations to address these problems.

### Worker Safety During COVID-19

The purpose of worker health and safety laws is to protect workers from being killed and otherwise harmed at work. Federal and state occupational safety and health agencies normally enforce worker health and safety laws. However, during the COVID-19 pandemic, the Centers for Disease Control and Prevention (CDC) and state legislators and governors have also been involved. The gaps in each response and its impact on workers’ health and safety are discussed below.

#### OSHA and States

The Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 et seq., (OSH Act) created OSHA and provided the agency with the authority to regulate the health and safety of all workers, except independent contractors and state and local government employees. The 21 states listed in Table 26.1 have OSHA-approved plans governing private and government workers and thus retain sole authority to address OSHA matters. OSHA retains authority to enforce federal occupational and health laws and regulations to protect private workers in the remaining 28 states and the District of Columbia.

Under the OSH Act, OSHA and the 21 states with OSHA-approved plans have the power to require employers to provide employees with personal protective equipment and develop a respiratory protection standard to prevent occupational disease (29 C.F.R. § 1910.134). Moreover, employers have a “general duty” to provide employees with a place of employment free from recognized hazards that are causing or likely to cause death or serious harm (OSH Act, 1970).

However, the OSH Act does not cover many direct care workers and some agricultural workers because they are classified as independent contractors. Even if the OSH Act does apply, it is insufficient to address COVID-19 because neither the respiratory standard nor the general duty clause requires employers to conduct

a worksite hazard assessment to determine how an airborne infectious disease can spread within the worksite or adopt specific measures to limit the spread of the airborne infectious disease in the worksite. OSHA noted the inadequacies of these laws to address airborne infectious diseases, like COVID-19, in its 2010 Infectious Diseases SER Background Document discussing a proposed airborne infectious disease rule.

In fact, OSHA has been developing an airborne infectious disease rule since 2005 that would fill these gaps and have a “direct benefit on reducing occupational illness rates for covered workers, but also have the ancillary benefit of reducing illness rates for patients and other individuals, such as family members, who come into contact with covered workers.” Although the rule was shelved in 2017, OSHA still has the power to issue an emergency temporary standard (ETS) to take immediate effect if it determines either that employees are exposed to grave danger from new hazards or that such emergency standard is necessary to protect employees from danger (OSH Act, 1970).

In March, members of Congress and numerous unions representing essential workers employed in the health care, food, and agricultural industries petitioned OSHA to issue an ETS, yet OSHA declined. The unions even filed a lawsuit to force OSHA to issue an ETS. Yet, the United States Court of Appeals for the D.C. Circuit ruled against the unions, stating that OSHA reasonably determined that an ETS was not necessary because of the regulatory tools that OSHA has to ensure that employers were maintaining hazard-free work environments (“American Federation of Labor and Congress of Industrial Organizations v. OSHA,” 2020).

However, contrary to the court’s ruling, OSHA’s current regulatory tools do not ensure that employers are maintaining hazard-free work environments as discussed above. None of the current laws and regulations gives OSHA the authority to mandate testing of workers even after it has been shown that a worker is infected with COVID-19 or to slow down work speeds in meat and poultry processing facilities to support social distancing. Moreover, although workers have filed over 5,000 complaints regarding workplace hazards that increase the risk of COVID-19 infection, OSHA has only issued one citation related to the pandemic and closed many of these complaints without in-person inspections (Held, 2020). Instead OSHA has relied on employers to make a “good faith” effort to comply with its advisory worker health and safety guidance rather than issue mandatory requirements or conduct in-person inspections (O’Scannlain, 2020).

Table 26.1: States with OSHA-approved plans for private and government workers

Alaska	Arizona	California	Hawaii	Indiana
Iowa	Kentucky	Maryland	Michigan	Minnesota
Nevada	New Mexico	North Carolina	Oregon	South Carolina
Tennessee	Utah	Vermont	Virginia	Washington
Wyoming				

Some states, like Illinois, have been conducting on-site health and safety inspections at hospitals. In addition, the Michigan governor enacted an executive order to provide health and safety protections for agriculture workers. Yet, there are still gaps in OSHA and state’s worker health and safety protection measures.

**Worker Health and Safety Guidance: OSHA and CDC**

OSHA, in partnership with the CDC, has issued numerous advisory worker health and safety guidance for workers and employers as a means to protect to worker health and safety. All of the guidance discuss very similar issues, such as the potential for workplace exposure and the need to create a COVID-19 assessment and control plan. Nevertheless, the guidance are not comprehensive and fail to recommend testing of all workers once a worker tests positive for COVID-19. Mandating testing of all workers after identification of an infected worker is necessary to track all worker infections as well as prevent the spread of COVID-19.

For example, after nearly two-dozen workers were hospitalized, Tyson Foods closed its Waterloo, IA pork processing plant in late April and tested all the workers. The testing showed that 1,000 workers were positive for COVID-19, including many who did not show any symptoms. Hence, without testing, the number of workers infected would not have been known and asymptomatic workers would have continued to spread the disease. Since then, Tyson has tested almost every worker at its 20 facilities. However, this is just one business that chose to conduct testing. Without mandates or even suggestions for testing in the OSHA/CDC guidance, there is no way to know the occupations most impacted

by COVID-19 or guarantee that other businesses will test essential workers and disclose the results. In fact, agricultural workers at a pistachio farm in California didn’t know coworkers had tested positive for COVID-19 until they learned it from the media.

Worker health and safety is further compromised by the delay in issuing guidance. In mid-April, there were already signs of outbreaks tied to agriculture businesses as evidenced by the 100 COVID-19 cases linked to a produce-processing plant in Rhode Island. However, the guidance for agricultural workers was not issued until June 2, 2020. By that time over 2,076 agricultural workers in New York, 1,948 in California, and over 1,000 in Illinois, Texas, Iowa, Washington, and Minnesota were infected with COVID-19 (Sowder, 2020). Hence, for some essential workers, the guidance have been woefully late.

Furthermore, none of the recommendations are mandatory. In fact, all of them state that the “guidance is not a standard or regulation, and it creates no new legal obligations. ... The recommendations are advisory in nature, informational in content, and are intended to assist employers in providing a safe and healthful workplace” (CDC & OSHA, 2020). Even though all the guidance also say that employers are required to comply with the OSH Act’s general duty clause, it is unclear what recommendations are mandatory because none of the recommendations are linked to the general duty clause.

Thus, employers are free to ignore the guidance, which has left many workers, especially essential workers, susceptible to COVID-19 infection at their workplace. State laws have also left essential workers unprotected.

Table 26.2: States with Business Liability Laws

STATES	BUSINESS SHIELD LAWS
Alabama	Proclamation by governor; Workers must show clear and convincing evidence that COVID-19 exposure was caused by the businesses’ wanton, reckless, willful, or intentional misconduct and damages for serious harm are limited to actual economic compensatory damages.
Iowa	Act; Limits recovery for workplace COVID-19 exposure to acts that were intended to cause harm or constitute actual malice, but provides a safe harbor if the business complied with either a federal or state statute, regulation, order, or public health guidance related to COVID-19.
North Carolina	Act; Limits recovery for COVID-19 exposure to acts that consisted of gross negligence, reckless misconduct, or intentional infliction of harm, but allows for claims under workers’ compensation.
Oklahoma	Act; Limits recovery for COVID-19 exposure if the business was in compliance with federal or state regulations, a presidential or gubernatorial executive order, or guidance.
Utah	Act; Limits recovery for COVID-19 exposure to acts that consisted of willful misconduct, reckless infliction of harm, or intentional infliction of harm, but allows for claims under workers’ compensation.
Wyoming	Act; COVID-19 infection of workers is presumed to happen at work so employees are eligible for workers’ compensation; limits business liability for those who in good faith followed instructions of a state, city, town, or county health officer.


**State Laws**

Many states have begun to issue laws and policies to provide businesses with liability shields from worker COVID-19 lawsuits, which are summarized in Table 26.2.

The laws in North Carolina, Utah, and Wyoming specifically note that the liability shield does not impact workers’ compensation. Although workers’ compensation laws are different in each state, most states provide workers injured on the job with wage replacement benefits, medical treatment coverage, vocational rehabilitation, and a settlement if the injury leaves the worker permanently disabled. California, Michigan, and Kentucky passed laws making it easier for all employees to prove workplace COVID-19 exposure so they can receive workers’ compensation.

In other states it is unclear whether state worker’s compensation laws

provide coverage for workplace infectious disease outbreaks. Many states exclude the “ordinary disease of life,” such as a cold or the flu, yet the COVID-19 pandemic seemingly goes beyond the “ordinary disease of life” (National Council on Compensation Insurance, 2020). Virginia’s law specifically notes that an infectious or contagious disease is covered under worker’s compensation, yet many states have not provided such clarification (VA Code Ann §65.2-401, 1997). Furthermore, although many states have expanded workers’ compensation, like in Missouri and Washington, to cover COVID-19 infection, some of these laws are limited to first responders or health care personnel (NCCI, 2020).

Without clarification of the workers’ compensation laws and coverage for all essential workers, liability shields will leave many essential workers without compensation to cover missed wages and to pay for health insurance if they contract COVID-19 in the workplace. To fill the gap, states should make it easier for all essential workers to obtain worker’s compensation for workplace COVID-19 exposure. Alternatively, the federal government could enact the Pandemic Risk Insurance Act, creating a national COVID-19 workers compensation system (NCCI, 2020). 

# Recommendations for Action

## Federal government:

### President and Congress should

- Enact a national paid sick leave law, not limited by worker status or employer size, with retaliation protection.
- In all laws and regulations enacted to shield businesses from liability, include worker economic and safety protections including, but not limited to hazard pay, death benefits, workers' compensation for COVID-19 infections, mandatory infectious disease protections, and significant increased funding and authority for enforcement of worker health and safety laws.
- Enact law giving OSHA authority to address food production speeds to enable social distancing.
- Enact the Pandemic Risk Insurance Act, creating a national COVID-19 workers compensation system.

### OSHA and States with OSHA Approved Plans should

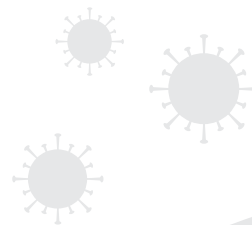
- Adopt an emergency temporary standard based on the proposed airborne infectious disease rule.
- Publish a final rule based on the proposed airborne infectious disease rule that includes the authority to regulate food production speeds.
- Make complaint data publicly available and disaggregate by industry to determine businesses that are hotspots for COVID-19.
- Conduct in-person inspections of business that are hotspots for COVID-19, including, but not limited to hospitals, long-term care facilities, meat and poultry processing facilities, farms, and food processing facilities.
- Mandate testing of workers employed at businesses that are hotspots for COVID-19, including, but not limited to hospitals, long-term care facilities, meat and poultry processing facilities, farms, and food processing facilities.

### OSHA and CDC should

- Track COVID-19 infections and deaths by occupation to determine what workers are most impacted by COVID-19.
- Mandate testing of all workers after identification of an infected worker to prevent the spread of COVID-19 at workplaces.

## State governments:

- Should enact statewide paid sick leave requirement, not limited by worker status or employer size, with retaliation protection for those not covered by a national law.
- In all laws and regulations enacted to shield businesses from liability, states should include worker economic and safety protections including, but not limited to hazard pay, death benefits, workers' compensation for COVID-19 infections, mandatory infectious disease protections, and significant increased funding and authority for enforcement of worker health and safety laws.



## About the Author

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