

Washington University Journal of Law & Policy

Volume 64 *The Legal Impacts of COVID-19*

2021

The Human Right to Workplace Safety in a Pandemic

Ruben J. Garcia

University of Nevada, Las Vegas, William S. Boyd School of Law

Follow this and additional works at: https://openscholarship.wustl.edu/law_journal_law_policy



Part of the [Health Law and Policy Commons](#), [Human Rights Law Commons](#), [Labor and Employment Law Commons](#), and the [Labor Relations Commons](#)

Recommended Citation

Ruben J. Garcia, *The Human Right to Workplace Safety in a Pandemic*, 64 WASH. U. J. L. & POL'Y 113 (2021),
https://openscholarship.wustl.edu/law_journal_law_policy/vol64/iss1/10

This Article is brought to you for free and open access by Washington University Open Scholarship. It has been accepted for inclusion in Washington University Journal of Law & Policy by an authorized administrator of Washington University Open Scholarship. For more information, please contact digital@wumail.wustl.edu.

THE HUMAN RIGHT TO WORKPLACE SAFETY IN A PANDEMIC

Ruben J. Garcia*

ABSTRACT

The COVID-19 pandemic has presented unique challenges for immigrant workers many of whom occupy jobs most at risk in the pandemic: health care, janitorial services, and mass transit. This Article encourages the extension of human rights instruments protecting health and safety in the workplace to all workers, particularly immigrant workers. Garcia analyzes the options available for workers who confront unsafe working conditions under existing law. Expanding the language of “human rights” will allow for greater scrutiny of actions taken by the government and employers. Garcia encourages statutory changes to OSHA and the NLR, test cases, filing complaints under trade agreements, and lodging complaints with the ILO in order to keep all workers safe.

* Professor of Law, Co-Director, UNLV Workplace Law Program, University of Nevada, Las Vegas, William S. Boyd School of Law. Many thanks to UNLV Law students Joey Adamiak and Erika Smolyar for excellent research on this Article.

INTRODUCTION

The COVID-19 pandemic has exposed many of the fault lines in worker protection that existed for decades before the coronavirus stopped most business and the global economy in March 2020.¹ The slowdown has resulted in many working from home or being laid off, while a number of workers deemed essential continued working, whether in health care, law enforcement, or food processing.² These workers have continued working throughout the pandemic, often without the personal protective equipment (PPE) that they need.³ Many have advocated for better safety measures to be in place at their workplaces.⁴

In addition to people in prisons and nursing homes, immigrant workers have also been at risk, whether they are authorized to work in the United States or are undocumented.⁵ Meatpacking plants in particular have become

-
1. See SHARON BLOCK & BENJAMIN SACHS, CLEAN SLATE FOR WORKER POWER, CLEAN SLATE FOR WORKER POWER: BUILDING A JUST ECONOMY AND DEMOCRACY 16–21 (June 2020), https://assets.websitefiles.com/5ddc262b91f2a95f326520bd/5e3096b9feb8524936752fe0_CleanSlate_SinglePages_ForWeb_noemptyspace.pdf [<https://perma.cc/3NX7-JDH6>]; See generally SHARON BLOCK & BENJAMIN SACHS, CLEAN SLATE FOR WORKER POWER, WORKER POWER AND VOICE IN THE PANDEMIC RESPONSE (2020), https://assets.websitefiles.com/5ddc262b91f2a95f326520bd/5ef2396d689c3880ec008db2_Clean%20Slate_Worker%20Power%20and%20Voice%20in%20the%20Pandemic%20Response.pdf [<https://perma.cc/Z645-AQDG>].
 2. Alison Knezevich & Meredith Cohn, “It’s Terrifying:” Service Workers Fear for their Jobs, Health as Coronavirus Spreads, THE BALTIMORE SUN (Mar. 14, 2020), <https://www.baltimoresun.com/coronavirus/bs-md-coronavirus-service-workers-20200313-anhocn3mmbdi7k4tci3t2edr7m-story.html> [<https://perma.cc/FEW9-TZ3W>].
 3. Jacob Leibenluft & Ben Olinsky, *Protecting Worker Safety and Economic Security During the Covid-19 Reopening*, Report, CENTER FOR AMERICAN PROGRESS, (June 11, 2020), <https://www.americanprogress.org/issues/economy/news/2020/06/11/486146/protecting-worker-safety-economic-security-covid-19-reopening/> [<https://perma.cc/2L88-SRFQ>].
 4. On what it means to be an “essential worker,” see, e.g., Amy Reed Sandoval, *Calling Undocumented Farmworkers “Essential” Exacerbates Their Oppression*, NEV. INDEP. (May 14, 2020), <https://thenevadaindependent.com/article/calling-undocumented-farmworkers-essential-exacerbates-their-oppression> [<https://perma.cc/YQW5-DSM9>]. For data on essential workers being deported, see Maurizio Guerrero, *Thousands of Essential Workers are at Risk of Deportation*, IN THESE TIMES (May 15, 2020), <http://inthesetimes.com/working/entry/22528/essential-worker-deportation-immigrant-undocumented-daca> [<https://perma.cc/6PAJ-354W>]; Deepa Das Acevedo, *Essentializing Labor Before, During, and After COVID-19*, SOC’Y FOR THE ANTHROPOLOGY OF WORK (May 6, 2020), <https://saw.americananthro.org/pub/essentializing-labor/release/1> [<https://perma.cc/VY2Q-QYNF>]; Patricia Mazzei, *Florida’s Coronavirus Spike is Ravaging Migrant Farmworkers*, N.Y. TIMES (June 18, 2020), <https://www.nytimes.com/2020/06/18/us/florida-coronavirus-immokalee-farmworkers.html> [<https://perma.cc/E6FF-9BRL>] (virus is moving through Florida’s agricultural communities just as laborers began to migrate north for the harvest).
 5. See Guerrero, *supra* note 4; Mazzei, *supra* note 4.

hotspots for infections.⁶ Immigrant workers occupy many of the jobs that are most at risk in the pandemic in health care, janitorial services, and mass transit.⁷ They also make up a large share of the workers at the nation's food processing plants.⁸ While construction and other infrastructure present unique challenges to operate safely in a pandemic, food processing, and specifically meat packing, presents a very difficult challenge for health and safety.

Before and during the pandemic, workers could utilize federal and state laws to protest unsafe conditions in the workplace.⁹ But these laws do not adequately protect workers and pose particular enforcement challenges. In this Article, I argue for several reforms that could improve domestic labor law. Further, I argue that all workers, and in particular immigrant workers, are protected by human rights instruments regarding health and safety in the workplace. This Article shows how the national instability occasioned by the pandemic has shown the weaknesses in domestic systems of protecting immigrant worker health and safety. These weaknesses include: (1) the lack of a private right of action for workers, (2) the high standard needed for

6. See *Meatpacking Plants and Prisons Continue to Drive Outbreaks in U.S. Hot Spots*, N.Y. TIMES (June 8, 2020), <https://www.nytimes.com/2020/06/08/world/coronavirus-live-updates.html> [<https://perma.cc/L7HE-PH3T>] (at least 591 employees of a Tyson Foods plant in Storm Lake, IA tested positive); Bridget Huber, *How Did Europe Avoid the COVID-19 Catastrophe Ravaging US Meatpacking Plants?* MOTHER JONES (June 13, 2020), <https://www.motherjones.com/food/2020/06/meatpacking-plants-covid-hotspots-europe-regulations-line-speed/> [<https://perma.cc/W5RD-XVVS>] (in the US, 24,715 workers caught COVID-19 and 86 deaths; in Europe, meatpacking there have been 2,670 cases and 4 deaths).

7. Pia M. Orrenius & Madeline Zavodny, *Do immigrants work in riskier jobs?* 46 DEMOGRAPHY 535 (2009). <https://doi.org/10.1353/dem.0.0064> [<https://perma.cc/C6P7-4UF8>].

8. Yulina Parshina-Kottas et al., *Take a Look at How Covid-19 Is Changing Meatpacking Plants*, N.Y. TIMES (June 8, 2020), <https://www.nytimes.com/interactive/2020/06/08/us/meat-processing-plants-coronavirus.html?action=click&module=Top%20Stories&pgtype=Homepage> [<https://perma.cc/54R3-3V6J>]; MATT MCCONNELL, HUM. RTS. WATCH, "WHEN WE'RE DEAD AND BURIED, OUR BONES WILL KEEP HURTING:" WORKERS' RIGHTS UNDER THREAT IN US MEAT AND POULTRY PLANTS 18 (Sept. 2019), <https://www.hrw.org/report/2019/09/04/when-were-dead-and-buried-our-bones-will-keep-hurting/workers-rights-under-threat#> [<https://perma.cc/TJ3T-DDXZ>]; Deborah Berkowitz & Shayla Thompson, *USDA Allows Poultry Plants to Raise Line Speeds, Exacerbating Risk of COVID-19 Outbreaks and Injury*, NAT'L EMP. L. PROJECT (June 17, 2020), <https://www.nelp.org/publication/usda-allows-poultry-plants-raise-line-speeds-exacerbating-risk-covid-19-outbreaks-injury/> [<https://perma.cc/SS93-2G2R>].

9. Celine McNicholas et al., *Why unions are good for workers—especially in a crisis like COVID-19: 12 policies that would boost worker rights, safety, and wages*, ECONOMIC POLICY INSTITUTE (Aug. 25, 2020), <https://www.epi.org/publication/why-unions-are-good-for-workers-especially-in-a-crisis-like-covid-19-12-policies-that-would-boost-worker-rights-safety-and-wages/> [<https://perma.cc/E8U3-QEKF>].

workers to walk off the job, (3) the need to engage in concerted activity to walk off the job, (4) the thin line between protected walkouts and unprotected quickie strikes; and (5) Congress's statutory delegation of wide authority over decades to the Executive Branch in times of crisis and emergency. Thus, this Article explores ways that that essential workers can be better protected, and ways that the dialogue about the health and safety of all workers, especially essential and immigrant workers must begin.

In Part II, I look at the conditions for low-wage workers, particularly immigrants, in this pandemic. I argue that unsafe conditions for essential workers existed well before the pandemic. The problem is that immigrants and people of color have been relegated to these jobs for decades, and wages as well as working standards have been low. These workers, many of them immigrants, are at risk for serious illness or death.

In Part III, I explore the different options for workers who confront unsafe working conditions under domestic federal and state laws. As we will see, the options will vary depending on whether employees can leverage collective action or have to proceed individually. The options will also vary depending on the state where the work is done, rather than a single national standard. This puts workers in a dilemma of deciding whether to refuse to work or to put up with unsafe conditions. This dilemma is further exacerbated by the immigration status of many of the workers.

In Part IV, I discuss the reforms needed to enhance the health and safety protections of all workers, including undocumented immigrants, both during and after the COVID-19 pandemic. First, statutory changes should be made to the Occupational Safety and Health Act (OSHA) and the National Labor Relations Act (NLRA).¹⁰ Next, there should be test cases against large corporations with innovative legal theories. Third, complaints should be filed under trade agreements, including the U.S.-Mexico-Canada Agreement (USMCA) alleging that the United States is failing to enforce its own health and safety laws. Finally, complaints should also be lodged with the International Labour Organization (ILO) alleging that the U.S. has failed to comply with its duties under the international human rights instruments to which it is a party. All of these measures are needed to improve the protection of essential workers.

These legal reforms could offer immediate relief in some instances.

10. For a set of reforms that would improve workers' collective power and thereby the situation of essential workers, see BLOCK & SACHS, *supra* note 1, at 22–80.

Fundamentally, though, we must ask whether there is some work in our economy, especially in a pandemic, that cannot be made safe, even with full enforcement of safety protocols. As the minimum wage has stagnated at \$7.25 an hour since 2009, it is clear that the market has failed to adequately compensate for the risk involved in some forms of work. This Article begins the discussion of whether in some instances work is so dangerous that the state should intervene and prevent workers from doing it.

I. THE CONTEXT

A. *The Racial and Nativist Cast of “Essential Work”*

The challenge of minimizing workplace related fatalities and injuries among all workers remains a daunting one. In 2018, American workers suffered a total of 5,250 workplace fatalities, or approximately 3.5 per 100,000 workers, remaining virtually unchanged from the fatalities that occurred in 2013.¹¹ In 2018, in the private industry alone, 2.8 million nonfatal occupational injuries and illnesses occurred, with 900,380 workers being required to miss at least one day of work.¹² Some industries, however, experience higher than average rates of worker fatalities. Workers in agriculture, forestry, and fishing suffer the highest death rate (23.4 deaths per 100,000 workers), followed by mining (14.1 deaths per 100,000 workers), transportation and warehousing (14 deaths per 100,000 workers), and construction (9.5 deaths per 100,000 workers).¹³ Workers in these industries also suffer a disproportionate number of nonfatal occupational illnesses and injuries.¹⁴ Some segments of the population work disproportionately in more dangerous jobs. Because of this, in 2018, men suffered 4,837 workplace deaths and Latinos suffered 961 workplace

11. U.S. BUREAU OF LAB. STAT., NATIONAL CENSUS OF FATAL OCCUPATIONAL INJURIES IN 2018 (Dec. 17, 2019), <https://www.bls.gov/news.release/pdf/foi.pdf> [<https://perma.cc/TBJ5-UX79>].

12. U.S. BUREAU OF LAB. STAT., ECONOMIC NEWS RELEASE: EMPLOYER-REPORTED WORKPLACE INJURY AND ILLNESS, 2018 (2019), <https://www.bls.gov/news.release/osh.nr0.htm> [<https://perma.cc/5NNZ-F43A>].

13. U.S. BUREAU OF LAB. STAT., HOURS-BASED FATAL INJURY RATES BY INDUSTRY, OCCUPATION, AND SELECTED DEMOGRAPHIC CHARACTERISTICS, 2018 (2019), <https://www.bls.gov/iif/oshcfoi1.htm#rates> [<https://perma.cc/B5D4-DLDD>].

14. U.S. BUREAU OF LAB. STAT., TABLE 1. INCIDENCE RATES OF NONFATAL OCCUPATIONAL INJURIES AND ILLNESSES BY SELECTED INDUSTRY AND CASE TYPES, PRIVATE INDUSTRY, 2017–18 (2019), <https://www.bls.gov/news.release/osh.t01.htm> [<https://perma.cc/747B-JJ9A>].

deaths, about a six percent increase for Latinos from 2017.¹⁵ These occupational deaths, injuries and illnesses place a severe human and economic impact on families and their communities.¹⁶

Even before the pandemic, then, the line between essential and dangerous work was a thin one. Many of the workers who do dangerous jobs are women and people of color.¹⁷ By design, the system seeks out employees at the margins of society. Those doing dangerous work may not have other options in the economy because of their immigration status or the market value placed on their labor.¹⁸

Studies have shown that wages are depressed in occupations with large numbers people of color and women, in so called “brown collar” and “pink collar” occupations.¹⁹ This means that in dangerous work like meat packing, with large numbers of immigrants and people of color, wages are not commensurate with the risk inherent in the job.²⁰ This wage issue is exacerbated in plants which are not unionized.²¹ Thus, having dangerous

15. U.S. BUREAU OF LAB. STAT., *supra* note 11. American workers suffered a total of 4,585 workplace fatalities, or approximately 3.3 per 100,000 workers, and 1,519,997 nonfatal occupational injuries or illnesses requiring days away from work, or approximately 1,094 per 100,000 workers. Some industries are much more dangerous than others with “agriculture, forestry and fishing” suffering the highest death rate (23.2 deaths per 100,000 workers) followed by transportation (14 deaths per 100,000 workers), mining (12.4 deaths per 100,000 workers) and construction (9.7 deaths per 100,000 workers). Workers in these industries also suffer a disproportionate number of nonfatal occupational injuries and illnesses. Because they work disproportionately in more dangerous jobs, men suffer 93% of workplace deaths and Latinos suffer 18% of workplace deaths. Bureau of Labor Statistics, *Census of Fatal Occupational Injuries Charts*, 2013 (revised data); Bureau of Labor Statistics, *Nonfatal Occupational Injuries and Illnesses Requiring Days Away From Work*, 2013.

16. Elise Gould & Valerie Wilson, *Black Workers Face the Two Most Lethal Complications for the Coronavirus: Racism and Economic Inequality*, ECONOMIC POLICY INSTITUTE (June 1, 2020), <https://www.epi.org/publication/black-workers-covid/> [https://perma.cc/WX2L-4HWK].

17. Connor Maxwell, *Workers of Color are Disproportionately at Risk of Serious Complications from the Coronavirus*, CENTER FOR AMERICAN PROGRESS (May 4, 2020), <https://www.americanprogress.org/issues/race/news/2020/05/04/484339/workers-color-disproportionately-risk-serious-complications-coronavirus/>.

18. Eduardo Porter, *The Danger From Low Skilled Immigrants: Not Having Them*, N.Y. TIMES, Nov. 8, 2017, <https://www.nytimes.com/2017/08/08/business/economy/immigrants-skills-economy-jobs.html> [https://perma.cc/9VV7-VMQN].

19. See generally Leticia Saucedo, *The Employer Preference for the Subservient Worker and the Brown Collar Workplace*, 67 OH. ST. L.J. 961 (2006).

20. David Cooper, *Workers of Color Are Far More Likely to Be Paid Poverty Level Wages*, ECONOMIC POLICY INSTITUTE, WORKING ECONOMICS BLOG (June 21, 2018), <https://www.epi.org/blog/workers-of-color-are-far-more-likely-to-be-paid-poverty-level-wages-than-white-workers/> [https://perma.cc/8GFL-GBZR].

21. *Employment and Wages in the Meat Industry*, AM. MEAT INST. (Oct. 2012), <https://www.meatinstitute.org/index.php?ht=a/GetDocumentAction/i/82885> [https://perma.cc/5UZA-

jobs does not necessarily translate to essential wages.

When essential workers raise safety issues at the work site, the employer sometimes hits back with race-based retaliation.²² Christian Smalls was a warehouse worker at Amazon's Staten Island facility who, in the midst of the COVID-19 pandemic, raised concerns about the need for a deep cleaning, paid time off during the deep cleaning, and additional sick leave; Amazon then began a campaign to publicly discredit him, calling him "not smart, or articulate."²³ Amazon defended the termination of Smalls as having nothing to do with his advocacy for safety but instead was due to his failure to quarantine for 14 days after testing positive for coronavirus.²⁴ While the NLRB will ultimately investigate the credibility of that defense, Amazon may be unique among employers to fire someone for such a reason during a pandemic.²⁵

NMLN] ("According to the United Food and Commercial Workers, 60 percent of meat packing and processing employees are estimated to be represented by the union."); see Kate Gibson, *13 U.S. Meat Industry Workers Have Died of COVID-19, Union Says*, CBS NEWS (Apr. 24, 2020), <https://www.cbsnews.com/news/coronavirus-meat-industry-workers-died-covid-19/> [https://perma.cc/PMW6-DFHD] ("The union that represents 250,000 meatpacking and poultry plant workers is calling for improved protections for those on the front lines of sustaining the nation's food supply as the coronavirus spreads.").

22. Leila Miller, *Low-Wage Workers Face Retaliation for Demanding Covid-19 Protections at Work*, L.A. TIMES (Aug. 15, 2020), <https://www.latimes.com/california/story/2020-08-15/coronavirus-workers-retaliation-claims> [https://perma.cc/T9CB-DF4G].

23. See Aaron Mak, *Amazon and Instacart Workers Are Striking for COVID-19 Protections*, SLATE (Mar. 30, 2020), <https://slate.com/technology/2020/03/amazon-instacart-workers-strike.html> [https://perma.cc/LZ8L-NHEQ]; Jane Wakefield, *Coronavirus: "Not Smart" Memo Shows Amazon's Union Stance*, BBC NEWS (Apr. 3, 2020), <https://www.bbc.com/news/technology-52151161> [https://perma.cc/2CYC-5SB2].

24. *Id.* See also Annie Palmer, *Amazon Lawyer Calls Fired Warehouse Worker Not Smart or Articulate in Meeting With Top Execs*, CNBC (Apr. 2, 2020), <https://www.cnbc.com/2020/04/02/amazon-lawyer-calls-fired-warehouse-worker-not-smart-or-articulate.html> [https://perma.cc/WP92-EJ88].

25. Taylor Sonnemaker, *Amazon is Facing Numerous Inquiries From Labor Regulators*, BUSINESS INSIDER (Apr. 20, 2020), <https://www.businessinsider.com/amazon-nlrb-inquiries-workers-protests-coronavirus-warehouse-conditions-2020-4> [https://perma.cc/KXY2-DT76].

B. The Dangerous Landscape for Undocumented Immigrants

Immigrants, especially undocumented immigrants, have frequently been segregated into the most dangerous low paying jobs in agriculture, construction, and food processing.²⁶ Many workers in other industries, such as forestry and seasonal work, enter the country through temporary worker programs that have often been rife with worker abuse.²⁷

While undocumented immigrants face numerous uncertainties about their legal status before and during the COVID-19 pandemic, they continue to be considered statutory “employees” under most federal and state laws for the purposes of their rights to form and join unions, collect unpaid wages and overtime, and have protections and compensation against workplace hazards.²⁸ However, the United States Supreme Court has held that undocumented workers who are fired for supporting a union are not entitled to the same remedies as other employees in similar cases.²⁹

In any time of global upheaval, some question whether rights should apply with the same effect as before the crisis.³⁰ Rights to unionize are at risk during the pandemic because of the NLRB’s failure to have a mail ballot

26. For a discussion on the expectation that Latino/a workers will do such jobs for lower pay than white workers and how their presence keeps wages in the sectors low, see Saucedo, *supra* note 19, at 964–65.

27. See Ruben J. Garcia, *Labor as Property: Guestworkers, International Trade, and the Democracy Deficit*, 10 J. GENDER, RACE & JUST. 27 (2006); Dave Jamieson, *Guest Workers Describe Coronavirus Nightmare on Louisiana Crawfish Farm*, HUFFPOST (June 17, 2020), https://www.huffpost.com/entry/migrant-workers-describe-coronavirus-nightmare-on-louisiana-crawfish-farm_n_5ee926fac5b67912c6a870b3 [<https://perma.cc/WK87-WNY9>].

28. See *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984) (NLRA); *Patel v. Quality Inn S.*, 846 F.2d 700 (11th Cir. 1988) (FLSA); *Agri Processor Co. v. NLRB*, 514 F.3d 1 (D.C. Cir. 2008) (representation elections).

29. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002).

30. Richard Haass, *The Pandemic Will Accelerate History Rather Than Reshape It*, FOREIGN AFFAIRS (Apr. 7, 2020), <https://www.foreignaffairs.com/articles/united-states/2020-04-07/pandemic-will-accelerate-history-rather-reshape-it> [<https://perma.cc/9YNR-FNZ4>].

election rule.³¹ Many privacy protections that exist may also be at risk.³² Requirements to work may also run afoul of forced labor conventions, as will be discussed below.

C. The OSHA Statutory Landscape

The right to worker health and safety is protected primarily by the Occupational Safety and Health Act of 1970 (OSH Act).³³ Congress based the authority to regulate health and safety in the workplace in the Commerce Clause of the Constitution. Similarly, Congress's authority to enact the National Labor Relations Act (NLRA), which granted workers the right to organize and bargain collectively, also originated in the Commerce Clause.³⁴ But there are other constitutional provisions upon which the right to health and safety might be based, such as the Thirteenth Amendment to the Constitution.³⁵

Congress charged the federal Occupational Safety and Health Administration (OSHA) with the enforcement of the OSH Act.³⁶ The strength of OSHA's enforcement has varied widely based on the political party of the administration at the time. When the Executive Branch is controlled by the Democrats, enforcement of the OSH Act is more vigorous.

31. "The National Labor Relations Board (NLRB) has lifted its stay of a mail ballot election ordered by a Regional Director and denied the employer's Request for Review of the Regional Director's decision, based on the COVID-19 pandemic, to order a mail, rather than manual, ballot election. *Atlas Pacific Eng'g Co.*, 27-RC-258742 (N.L.R.B. May 8, 2020) . . . In its May 8 decision, the NLRB relied on *San Diego Gas & Elec.*, 325 N.L.R.B. 1143, 1145 (1998), where it held that, although manual ballot elections normally should be held, "there may be other relevant factors that the Regional Director may consider in making this decision," and that "extraordinary circumstances" could permit a Regional Director to exercise their discretion outside of the guidelines in that decision." Howard Bloom et al., *NLRB Orders Mail Ballot Election Delayed by Pandemic Concerns to Proceed*, JACKSON LEWIS (May 14, 2020), <https://www.jdsupra.com/legalnews/nlr-orders-mail-ballot-election-99537/> [<https://perma.cc/5MW8-6NHU>]; Currently five union elections are still on hold because of the rule. Robert Iafolla, *Union Election Hang in the Balance as NLRB Ponders Vote by Mail*, BLOOMBERG LAW (Oct. 7, 2020), <https://news.bloomberglaw.com/daily-labor-report/union-elections-hang-in-the-balance-as-nlr-ponders-vote-by-mail> [<https://perma.cc/6Z5T-NF45>].

32. Compare *The Guard Publishing Co.*, 351 NLRB, at 1110 (2007) (where the majority of Board members were appointed by Republican President George W. Bush) with *Purple Comm'n, Inc.* 361 NLRB at 1050 (2014) (where the majority of Board members were appointed by Democratic President Barack Obama).

33. 29 U.S.C. §§ 651–78.

34. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

35. See U.S. CONST. amend. XIII; See *infra* Part IV.D.

36. 29 U.S.C. § 651.

When, as now, OSHA is under the leadership of a Republican administration, it is less strictly enforced and thus generally more favorable to employers.³⁷

As with many workplace rights, enforcement of the right to workplace safety varies significantly depending on the employee's state of residency. There are twenty-two state plans that cover both public and private sector workplaces.³⁸ Although the federal statute only requires that OSHA state plans be "at least as effective" as the federal OSH Act, many states provide higher protections than required by the federal OSH Act.³⁹ In all states, however, the employee must rely upon the federal or state agency to correct workplace hazards. They cannot go directly to court to enjoin a hazard condition in the workplace on their own, as the law does not provide employees a private right of action to do so.⁴⁰

37. AMERICAN FEDERATION OF LABOR-CONGRESS OF INDUSTRIAL ORGANIZATIONS, REPORT, DEATH ON THE JOB: THE TOLL OF NEGLECT 2019, (Apr. 25, 2019), <https://aflcio.org/reports/death-job-toll-neglect-2019> [<https://perma.cc/X8GU-TUEL>].

38. See *State Plans*, UNITED STATES DEP'T OF LAB., <https://www.osha.gov/stateplans> [<https://perma.cc/GV7N-KBJ4>]. There are twenty-two state plans covering public and private sector employees in Alaska, Arizona, California, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, Wyoming. There are six state plans covering only state and local government workers: Connecticut, Illinois, Maine, New Jersey, New York, Virgin Islands.

39. 29 U.S.C § 667(c)(2)–(3).

40. Kate Andrias, *Peril and Possibility: Strikes, Rights, and Legal Change in the Age of Trump*, David E. Feller Memorial Labor Law Lecture (Apr. 5, 2018), in 40 BERKELEY J. EMP. & LAB. L. 135, 148 (2019); Kari Paul, *Hundreds of Amazon Warehouse Workers to Call In Sick in Coronavirus Protest*, THE GUARDIAN (Apr. 21, 2020), <https://www.theguardian.com/technology/2020/apr/20/amazon-warehouse-workers-sickout-coronavirus> [<https://perma.cc/W5U8-5D7A>]; Michael H. LeRoy, *Creating Order Out of Chaos and Other Partial and Intermittent Strikes*, 95 NW. U. L. REV. 221, 239 (2000); Michael C. Duff, *New Labor Viscerality? Work Stoppages in the "New Work," Non-Union Economy*, ST. LOUIS U. L.J. (forthcoming 2021) (manuscript at 2), <https://ssrn.com/abstract=3637605> [<https://perma.cc/2YHY-TMTR>].

C. The Lingering Problems in Food Processing Plants

Workers at food processing plants have been particularly vulnerable, because of the line speeds that make it impossible to practice social distancing with the volume of meat that is being produced.⁴¹ Health and safety problems in meatpacking facilities go back decades.⁴² In 2005, Human Rights Watch issued a report that documented conditions in meat packing plants that violated several human rights instruments.⁴³

According to U.S. government estimates, more than thirty percent of workers in meat packing plants are foreign-born, a rate three times higher than most other industries.⁴⁴ While it is hard to determine the exact number in the industry who are undocumented, there is evidence that many of the workers are undocumented and come through family networks.⁴⁵

Even though undocumented employees are protected by numerous federal and state workplace laws, their status might make them reticent to call for safety protections at their worksites.⁴⁶ The threat of retaliation by deportation looms large for these employees, even though their employers have also violated the law by hiring them.⁴⁷

Undocumented workers suffer workplace injuries and deaths at higher

41. Jerald Brooks & Lakesha Bailey, *We're Feeding America, but We're Sacrificing Ourselves*, N.Y. TIMES (June 15, 2020), <https://www.nytimes.com/2020/06/15/opinion/coronavirus-tyson-poultry.html> [<https://perma.cc/4Y3W-89HS>] (“[A]t Tyson Plants around the country, over 7,000 employees have tested positive for the virus Despite this, the company recently reverted to its pre-coronavirus absentee policy; workers who fear getting infected will now be penalized for staying home.”).

42. Megan Molteni, *Why Meatpacking Plants Have Become Covid-19 Hot Spots*, WIRED (May 7, 2020, 7:00 AM), <https://www.wired.com/story/why-meatpacking-plants-have-become-covid-19-hot-spots/> [<https://perma.cc/46JU-FH3A>].

43. LANCE COMPA, HUMAN RIGHTS WATCH, BLOOD, SWEAT & FEAR, WORKERS’ RIGHTS IN U.S. MEAT AND POULTRY PLANTS (Jan. 2005), <https://www.hrw.org/reports/2005/usa0105/> [perma.cc/QK59-EP2Z].

44. MCCONNELL, *supra* note 8, at 23.

45. Eric Schlosser, *America’s Slaughterhouses Aren’t Just Killing Animals*, ATLANTIC (May 12, 2020), <https://www.theatlantic.com/ideas/archive/2020/05/essentials-meatpacking-coronavirus/611437/> [<https://perma.cc/DG36-9R4H>].

46. There have already been lawsuits against poultry plants. Fatima Hussein, *Sued Over Covid-19, Companies Scramble for Federal Court Shelter*, BLOOMBERG LAW (July 20, 2020), <https://news.bloomberglaw.com/daily-labor-report/sued-over-covid-19-companies-scramble-for-federal-court-shelter> [<https://perma.cc/KCQ2-F2L6>].

47. *Penalties*, U.S. CITIZENSHIP & IMMIGRATION SERVS. (July 10, 2020), <https://www.uscis.gov/i-9-central/penalties> [<https://perma.cc/M27A-2MAV>].

rates than those who are not undocumented.⁴⁸ The essential nature of their work has led to the exploitation of this class of workers. Several cases have been brought to deal with wage theft at the hands of employers, but there are also underlying issues of health and safety revealed by the complaints.⁴⁹ Because there is no private right of action under the OSH Act, the health and safety of these workers often depends upon who is in charge of OSHA.⁵⁰ During Republican-controlled federal administrations like the Trump Administration, past data shows that the number of complaints and level of enforcement decreased dramatically in states without a state plan agency, which codify workers' rights of actions and provide stronger protections against non-enforcement at the federal level.⁵¹

II. LEGAL OPTIONS FOR REFUSING DANGEROUS WORK

A. *The National Labor Relations Act*

By enacting the National Labor Relations Act (NLRA) in 1935, Congress made collective action by workers crucial to equalize the balance of power between employers and employees.⁵² Section 7 of the NLRA protects freedom of association against interference by private sector

48. Sally C. Moyce & Marc Schenker, *Migrant Workers and Their Occupational Health and Safety*, 2018 39 ANN. REV. PUB. HEALTH 351, 357 (Jan. 24, 2018) (“Workers who lack legal authorization to work are arguably most susceptible to negative health outcomes. In a survey of more than 4,000 workers in low-wage jobs in Chicago, Los Angeles, and New York, researchers found that undocumented workers were more than two times as likely to experience wage violations compared with documented workers.”).

49. Terri Gerstein, WORKERS’ RIGHTS PROTECTION AND ENFORCEMENT BY STATE ATTORNEYS GENERAL, <https://www.epi.org/publication/state-ag-labor-rights-activities-2018-to-2020/> [https://perma.cc/P5GX-SK5E].

50. Testimony of David Michaels, Assistant Secretary for Occupational Safety and Health, U.S. Department of Labor, Before the Committee on Health Education, Labor and Pensions, U.S. Senate, Apr. 27, 2010, https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=testimonies&p_id=1122 [https://perma.cc/R62W-GQ6K]; David R. Michaels & Gregory R. Wagner, *Halting Workplace COVID-19 Transmission: An Urgent Proposal to Protect American Workers*, THE CENTURY FOUNDATION (Oct. 15, 2020), <https://tcf.org/content/report/halting-workplace-covid-19-transmission-urgent-proposal-protect-american-workers/> [https://perma.cc/XNW5-TEHT].

51. Alison D. Morantz, *Has Devolution Injured American Workers? State and Federal Enforcement of Construction Safety*, 25 J.L. ECON. & ORG. 183 (2007); James A. Gross, *Undermining Worker Safety and Health Protection Through Statutory Interpretation*, 36 HOFSTRA LAB. & EMP. L.J. 225 (2019).

52. Pub. L. No. 74–198, 49 Stat. 449.

employers. Section 7 protects employees' "right to self-organization, to form, join or assist labor organizations . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection"⁵³

The initial step for employees to engage in collective action with their coworkers is the federal Norris-LaGuardia Act (NLGA) of 1932. Passed during the Great Depression, the 72nd Congress found that "the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor . . . it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing"⁵⁴ Unsafe conditions at work are part of the working conditions that the NLGA and the NLRA intended to empower workers to rectify by empowering them to join together.⁵⁵

The Supreme Court has long held that Section 7 was not just intended to get better wages or hours. In fact, the Court held in 1962 that Section 7 allows workers to get a change in the temperature of the shop floor. In *NLRB v. Washington Aluminum*, workers at a metal shop walked off the job on January 5, 1959, an "extraordinarily cold day in Baltimore, with unusually high winds and a low temperature of 11 degrees followed by a high of 22."⁵⁶ The employees, not represented by a union, conferred among themselves and walked off the job.⁵⁷ Rather than disapprove of their actions, their foreman said to other employees that if they had any guts, they would go home too.⁵⁸ The employer discharged the employees who walked out.⁵⁹

The NLRB held the discharges violated the act and moved to enforce its order in the Fourth Circuit.⁶⁰ The Fourth Circuit reversed, reasoning that the employees should have given the employer the opportunity to correct the offending health and safety condition (the temperature) and as a result

53. 29 U.S.C. § 157.

54. 29 U.S.C. § 102, ch. 90, 47 Stat. 70.

55. Josh Bivens, et al., *How Today's Unions Help Working People*, ECONOMIC POLICY INSTITUTE (Aug. 24, 2017), <https://www.epi.org/publication/how-todays-unions-help-working-people-giving-workers-the-power-to-improve-their-jobs-and-unrig-the-economy/> [<https://perma.cc/M8T7-SH7J>].

56. *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 11–12 (1962).

57. Gordon Lafer & Lola Loustaunau, *Fear at Work*, ECONOMIC POLICY INSTITUTE (July 23, 2020).

58. *Id.*

59. *Id.*

60. *Id.*

the discharges were not protected activity under the Act.⁶¹

The Supreme Court reversed on all points and enforced the order. The definition of “labor dispute” is broad and encompasses all “conditions of work.”⁶² And Section 7 does not require the employer and the employees to work out the issue before walking out—they can just walk out.⁶³ The employees of Washington Aluminum did just that, and their actions were protected.⁶⁴

Similarly, workers who believe their working conditions are unsafe have the right to walk out.⁶⁵ The facts and result of *Washington Aluminum* suggest that workers can walk out for a short time, and essentially engage in a quickie strike, over unsafe or unhealthy working conditions. However, the line between a protected walkout to get immediate improvements in working conditions and an unprotected quickie strike is a thin one.⁶⁶ For example, the General Counsel of the NLRB has developed a test to determine that question.⁶⁷ Further, employees also have to ensure that their walkout is both concerted and protected, or it will lose protection.⁶⁸

Despite the plain text of the NLRA, some Justices of the United States Supreme Court seems to want to limit the protections available to non-union workers.⁶⁹ In *Epic Systems v. Lewis*, the Supreme Court confronted the

61. *Id.* at 10, 13.

62. *Id.* at 15.

63. *Id.* at 18.

64. *Id.*

65. *E. Chi. Rehab. Center v. NLRB*, 710 F.2d 397, 397 (7th Cir. 1983).

66. *See, e.g.*, *Wal-Mart Stores, Inc.*, 368 N.L.R.B. No. 24 (2019).

67. In *University of Southern California*, 31-CA-23538 (Apr. 27, 1999), the NLRB General Counsel set forth a four factor test that determine whether intermittent strikes are unprotected: (1) the occurrence of more than two separate strikes, or threats of repeated strikes; (2) the strikes are not responses to distinct employer actions or problems with working conditions, but rather part of strategy to use a series of strikes in support of a single goal because this would be more crippling to the employer and/or would require less sacrifice by employees than a single prolonged work stoppage during which strikers could be replaced; (3) the union announces or otherwise states its intent to pursue a plan or strategy of intermittent strikes, or there is a clear factual evidence of an orchestrated strategy to engage in intermittent strike activity, and (4) the strikes are of short duration and proximate in time.

68. *See Protected Concerted Activity*, NLRB, <https://www.nlr.gov/about-nlr/rights-we-protect/our-enforcement-activity/protected-concerted-activity> [<https://perma.cc/7PVA-WSUG>].

69. *See, e.g.*, *Lechmere v. NLRB*, 502 U.S. 527 (1992) (opinion of Justice Thomas limiting the access of union organizers to unorganized employees); *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) (opinion of Chief Justice Rehnquist limiting the remedies of undocumented employees who have been fired for union organizing); *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018) (opinion of Justice Gorsuch allowing employers to require nonunionized employees to waive class actions in predispute mandatory arbitration clauses).

clash between the NLRA and the Federal Arbitration Act (FAA) of 1925.⁷⁰ Employees challenged the arbitration agreements as a violation of the NLRA's protection of concerted activities because of the waiver of class actions.

The NLRB brought the complaint based on the expansive language of Section 7 which protects the right of employees to organize and bargain collectively.⁷¹ Once there was a split in the circuits and the case went to the Supreme Court, the NLRB switched sides and supported the employer. The Court, in an opinion authored by Justice Neil Gorsuch, held that even though the text of the NLRA and the Norris La-Guardia Act was clear, Congress did not intend to protect workers not represented by a union from oppressive arbitration clauses.⁷²

The results of *Epic Systems* currently only apply to arbitration clauses, but might be extended to other nonunion contexts.⁷³ The right to have an employee present at an investigatory meeting has been limited to only those who are represented by unions on the Board's theory that the NLRA was intended to apply only to union workers.⁷⁴ All of these decisions cast further doubt on the ability of workers to challenge unsafe conditions at work, even as union representation drops to historic lows.⁷⁵

B. The Occupational Safety and Health Act

Employees can also refuse to work in unsafe conditions under OSHA, and the Secretary of Labor can file an action seeking their reinstatement and back pay.⁷⁶ The employee may refuse to work when the employee "[i]s ordered to work under conditions that the employee reasonably believes pose an imminent risk of death or serious bodily injury; and (2) the employee has reason to believe that there is not sufficient time or

70. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018).

71. *Id.* at 1621.

72. *Id.* at 1623.

73. *Id.* at 1639 (Ginsburg, J., dissenting).

74. *IBM Corp.*, 341 N.L.R.B. No. 148 (2004).

75. The percentage of private sector employees represented by unions in 2019 was 7.1 percent.

However, the percentage of government employees represented by unions in 2019 was 37.2 percent.

See U.S. BUREAU OF LAB. STAT., ECONOMIC NEWS RELEASE: TABLE 3. UNION AFFILIATION OF EMPLOYED WAGE AND SALARY WORKERS BY OCCUPATION AND INDUSTRY (Jan. 22, 2020),

<https://www.bls.gov/news.release/union2.t03.htm> [<https://perma.cc/J3J2-75RR>].

76. 29 U.S.C. § 657(f), (g).

opportunity to seek effective redress from his employer to apprise OSHA of the danger.⁷⁷ This was the OSHA regulation that the United States Supreme Court interpreted in *Whirlpool Corp. v. Marshall*.⁷⁸ In that case, two employees of an appliance manufacturer protested an unsafe wire mesh guard screen twenty feet above the shop floor intended to keep objects from falling and injuring the workers.⁷⁹ Although employees were allowed to walk on the guard screen, one worker fell through the screen to his death. The workers raised the problem of the guard screen being unsafe on several occasions but were rebuffed by management.⁸⁰

The employees walked off the job and were disciplined for doing so.⁸¹ They filed complaints with the Secretary of Labor, who in turn filed a lawsuit against Whirlpool alleging that the company had retaliated against the workers for asserting their rights afforded by the Act.⁸² The Sixth Circuit upheld the complaint and the company appealed to the Supreme Court.⁸³

Noting that the OSH Act did not delineate a specific right to refuse hazardous work, the *Whirlpool* decision focused on the propriety of the DOL's regulation.⁸⁴ Applying administrative law principles to the case, the Court held that the regulation was a "reasonable application" of the OSH Act. Thus, the employees were entitled to back pay for the time that the employer docked their pay.⁸⁵

Employees still must rely on the federal government to take action in the case, and there may be questions as to whether the Department of Labor is being faithful to the statute.⁸⁶ With delegation being an issue in the

77. *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 10–11 (1980).

78. *Id.*

79. *Id.* at 5–6.

80. *Id.* at 7–8.

81. *Id.*

82. *Id.*

83. *Id.* at 9–10.

84. *Id.*

85. *Id.* at 10–11.

86. See Jane Mayer, *How Trump is Helping Tycoons Exploit the Pandemic*, THE NEW YORKER (July 20, 2020), <https://www.newyorker.com/magazine/2020/07/20/how-trump-is-helping-tycoons-exploit-the-pandemic> [<https://perma.cc/N3ZJ-FU4J>]; Eyal Press, *Trump's Labor Secretary Is a Wrecking Ball Aimed at Workers*, THE NEW YORKER (Oct. 19, 2020), <https://www.newyorker.com/magazine/2020/10/26/trumps-labor-secretary-is-a-wrecking-ball-aimed-at-workers> [<https://perma.cc/6JXX-JGSF>].

modern political realm, we cannot rely on the courts.⁸⁷ Unlike Section 7 of the NLRA, however, refusal to work under OSHA does not require the employee to join together with another worker to walk out over the unsafe conditions.⁸⁸

C. *Abnormally Dangerous Conditions*

If an individual employee believes they are being exposed to “abnormally dangerous conditions,” he or she can walk off the job and not have it be considered a strike.⁸⁹ Section 502 of the Labor-Management Relations Act of 1947 also requires a good faith belief that the conditions are abnormally dangerous.⁹⁰ This is important because since the *NLRB v. Mackay Radio* decision, the courts have interpreted the right to strike to allow employers to permanently replace striking workers.⁹¹ It also means that any such walkout will not be a violation of an existing collective bargaining agreement.⁹²

The problem is that the “abnormally dangerous” is a high standard to meet.⁹³ The abnormally dangerous standard as it is applied to COVID-19 is yet to be determined. Most of the time, precedent cases involve more physically tangible elements of safety in the workplace.⁹⁴ There is no

87. *Id.* at 12–13.

88. In some cases, such as where a union contract is in place, employees can refuse to work under unsafe conditions because their right to work under safe conditions is “rooted” in an existing collective bargaining agreement. *NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 822–23 (1984).

89. Larry Drapkin, *The Right to Refuse Hazardous Work after Whirlpool*, 4 INDUS. REL. L.J. 29 (1980).

90. 29 U.S.C. § 143.

91. *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938).

92. See *The Right to Strike*, NLRB, <https://www.nlr.gov/strikes> [<https://perma.cc/G5VV-5YGN>].

93. *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368, 386–87 (1974) (citing *Gateway Coal Co. v. United Mine Workers*, 466 F.2d 1157 (Rosenn, J., dissenting)) (Section 502 work stoppage is protected only if a union presents “ascertainable, objective evidence...that an abnormally dangerous condition for work exists.”); *TNS, Inc. v. NLRB*, 296 F.3d 384, 390–94 (6th Cir. 2002) (approving the NLRB’s most recent interpretation of Section 502).

94. *Whirlpool Corp.*, 445 U.S. at 13 (upholding the DOL regulation that supported workers being able to walk out amidst unsafe conditions); *Collins v. City of Harker Heights*, 503 U.S. 115, 117 (1992) (declining to find a general due process right to a safe workplace); *Barth v. Firestone Tire & Rubber Co.*, 673 F. Supp. 1466, 1474–76 (N.D. Cal. 1987) (holding an employee was entitled to maintain an action against his employer for damages resulting from fraudulent concealment of aggravation of injuries where the employer knew of and failed to inform or protect employees from exposure to toxic substances); *Pauluk v. Savage*, 836 F.3d 1117, 1118–19 (9th Cir. 2016) (*Collins v. City of Harker*

precedent for when exposure to a virus becomes an “abnormally dangerous” workplace hazard, because there is no precedent for this virus.

Still, if there are any examples of what is abnormally dangerous in this pandemic, meatpacking plants might be the primary examples of abnormally dangerous work. Before the pandemic, these jobs were already dangerous. Now, with the companies seeking to fulfill the demand for meat in these times, large companies like Tyson and Cargill are ramping up production. *New York Times* reporting indicates that meatpacking employees on the production line stand shoulder to shoulder, meaning that with typical floor density, it would not be possible to maintain the six feet of social distancing required by the Centers for Disease Control.⁹⁵

D. Other Whistleblower Rights

There are whistleblower rights embedded in other statutory schemes. The Surface Transportation Assistance Act, for example, provides a remedy for over the road truckers who are retaliated against for raising safety concerns.⁹⁶ However, there can be disputes about whether the worker is protected, as the following case shows, which became known as the “frozen trucker” case during the United States Supreme Court confirmation hearings for Justice Neil Gorsuch.⁹⁷

In January 2009, Alphonse Maddin was a truck driver for TransAm Trucking. His truck broke down on a very cold night on the highway. He called his boss for help, who told him that he had to stay with the truck. As the temperature dropped to below freezing, the trucker decided to leave the truck. The employer fired Maddin for abandoning the truck, and Maddin filed a complaint against the employer.⁹⁸

Heights did not bar the § 1983 Due Process claim brought by the wife and daughters of a health district employee who died allegedly from toxic mold); *Perez v. U.S. Postal Serv.*, 76 F. Supp. 3d 1168 (W.D. Wash. 2015) (postal worker engaged in protected activities by assisting a coworker with an OSHA complaint, by accompanying OSHA inspectors on facility inspection, and by filing whistleblower complaints with OSHA).

95. See Parshina-Kottas et al., *supra* note 8.

96. 49 U.S.C. § 31105.

97. Debra Cassens Weiss, *Frozen Trucker Case is Among Decisions Said to Illustrate Gorsuch’s Legal Approach*, ABA Journal (Mar. 17, 2017), https://www.abajournal.com/news/article/case_of_frozen_trucker_is_among_decisions_said_to_illustrates_gorsuchs_lega [https://perma.cc/QFP3-8SM6].

98. *Id.*

The Department of Labor, which administers the Surface Transportation Assistance Act, filed a complaint against the employer, who appealed the citation to the U.S. Court of Appeals for the Tenth Circuit.⁹⁹ The court upheld the Department's citation of the trucking company and the attendant penalties.¹⁰⁰ Then-circuit judge Gorsuch dissented. He believed the employer had made its showing that the independent reason for the discharge was that Maddin was not "operating" the truck as instructed.¹⁰¹

The decision showed that refusal to work or leaving one's post can be frequently litigated, further adding uncertainty to the employee's decision to walk off his or her job. Now that Justice Gorsuch is on the U.S. Supreme Court, his appointment has only exacerbated the uncertainty facing workers who feel they must walk off the job for safety reasons.

E. The General Duty Clause

As described, the OSH Act has the general duty clause which can be enforced by OSHA and state agencies.¹⁰² The clause is broad. It requires the employer "to furnish to 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."¹⁰³ There are those who believe it should be considered narrowly, including Justice Brett Kavanaugh, who dissented from a panel opinion in the D.C. Circuit in a case titled *SeaWorld of Florida LLC v. Perez*.¹⁰⁴

The case originated from a fatal accident at SeaWorld of Florida when trainer Dawn Brancheau was killed by Tilikum, a killer whale that she was training.¹⁰⁵ The horrific accident, witnessed in the park by the audience, was investigated by the federal OSHA, which brought a complaint against SeaWorld under the general duty clause.¹⁰⁶ The agency cited SeaWorld for failing to protect employees from the recognized hazard of killer whales.¹⁰⁷

The company appealed the citation to the U.S. Court of Appeals for the

99. *TransAm Trucking Inc. v. Admin. Rev. Bd.*, 833 F.3d 1206, 1210–11 (10th Cir. 2016).

100. *Id.*

101. *Id.* at 1215 (Gorsuch, J., dissenting).

102. 29 U.S.C. § 654(a).

103. *Id.*

104. *SeaWorld of Fla., LLC v. Perez*, 748 F.3d 1202 (D.C. Cir. 2014).

105. *Id.* at 1205.

106. *Id.* at 1206.

107. *Id.*

District of Columbia Circuit, with the Secretary of Labor moving to enforce the citation.¹⁰⁸ The court upheld the OSHA citation, but then-circuit judge Brett Kavanaugh dissented.¹⁰⁹ He argued the general duty clause did not support the citation because Brancheau had “assumed the risk” of working with orcas.¹¹⁰

There is no OSHA standard for an airborne disease like COVID-19, but there have been calls for an emergency standard.¹¹¹ Given the lack of a standard, whether temporary or permanent, the general duty clause will be the backstop for many of these cases. If the question then goes to the Supreme Court, now-Associate Justice Kavanaugh will be one of the nine justices determining the scope of the general duty clause.

F. Collective Bargaining

All of the above statutory routes are available to union and nonunion workers alike. If the worker is covered by a collective bargaining agreement, there will usually be a contractual protection against unsafe work, as in the Supreme Court case *NLRB v. City Disposal Systems*.¹¹² In that case, James Brown refused to drive a truck that he said had unsafe brakes. The employer fired him for refusing to drive the truck.¹¹³

Brown filed a charge with the NLRB, which took it to the Third Circuit, where the discharge was upheld because Brown was not engaged in concerted activity. The Supreme Court reversed, holding that Brown’s actions, though individual, were rooted in the recognition clause of the collective bargaining agreement.¹¹⁴ “When, for instance, James Brown refused to drive a truck he believed to be unsafe, he was in effect reminding his employer that he and his fellow employees at the time their collective bargaining agreement was signed, had extracted a promise from City

108. *Id.*

109. *Id.* at 1216 (Kavanaugh, J., dissenting).

110. *Id.* at 1217.

111. Section 6(c)(1) of the OSH Act provides that the if the Secretary of Labor determines that employees are “exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards” an Emergency Temporary Standard (ETS) may be issued. ROTHSTEIN, CRAVER ET AL., EMPLOYMENT LAW 663 (6th ed. 2020).

112. 465 U.S. 822 (1984).

113. *Id.* at 828.

114. *Id.*

Disposal that they would not be asked to drive unsafe trucks.”¹¹⁵ Thus, Brown’s “quickie strike” was protected activity, even though he acted alone.

Although *City Disposal* found that Brown’s actions were protected, the Court did not indicate whether his “strike” was in violation of the collective bargaining agreement. If the work is “abnormally dangerous,” the employee can refuse to work without violating the no-strike clause of the collective bargaining agreement. At the same time, as discussed above, the standard for abnormally dangerous is very high.¹¹⁶

Unions with collective bargaining agreements uniformly have health and safety provisions that require the employer to provide a safe workplace. If the employer fails in that obligation, the union can move in federal court to enforce the health and safety obligations under section 301 of the Labor Management Relations Act (LMRA).¹¹⁷ The action is called a “reverse *Boys Markets* injunction,” after the United States Supreme Court’s 1970 decision in *Boys Markets Inc. v. Retail Clerks, Local 770*, which held that an employer can enjoin its union’s strike when that union strikes in violation of a no-strike clause.¹¹⁸ This can occur in spite of the Norris-La Guardia’s Act’s explicit bar on federal court injunctions of peaceful labor disputes.¹¹⁹

Where there is a union, the reverse *Boys Markets* injunction is one of many tools that exist to deal with serious health and safety issues. As described above, though, union representation currently covers only about 7.2 percent of the private sector workforce.¹²⁰ Thus, other strategies are needed.

115. *Id.* at 832.

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

117. 29 U.S.C. § 185.

118. *Boys Markets Inc. v. Retail Clerks, Local 770*, 398 U.S. 235 (1970); *Int’l Union, UAW v. Pendergrass*, 878 F.2d 389, 390 (D.C. Cir. 1989).

119. Karl E. Klare, *The Politics of Labor Law*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* (David Kairys ed., 2d ed. 2000).

120. Celine McNicholas, Heidi Shierholz & Margaret Paydock, *Union Workers Had More Job Security during the Pandemic, but Unionization Remains Historically Low*, Jan. 22, 2021, <https://www.epi.org/publication/union-workers-had-more-job-security-during-the-pandemic-but-unionization-remains-historically-low-data-on-union-representation-in-2020-reinforce-the-need-for-dismantling-barriers-to-union-organizing/>.

G. Unemployment Insurance

The decision to refuse unsafe work also presents a conundrum to workers seeking unemployment insurance. Although unemployment insurance is a federal program, state laws consistently disqualify workers who leave their job voluntarily.¹²¹ Thus, under current state statutory regimes, employees deciding whether to refuse unsafe work may be risking their unemployment benefits.¹²² The worker may decide to refuse the work and then argue that the separation from employment was a constructive discharge because the conditions were extreme and unreasonable.¹²³ This is a high burden in many cases, including even, at times, in sexual harassment cases.¹²⁴

But federal law allows for employees to refuse work because of violations of law.¹²⁵ The Department of Labor has the responsibility to enforce the ability of employees to work in a safe environment, but it has so far refused to insist that states provide employees the right to refuse hazardous work and collect unemployment benefits. This needs to change.

121. See, e.g., *Appeal of Peterson*, 126 N.H. 605, 495 A.2d 1266 (1985) (citing RSA 282-A:32, I(a) (Supp.1983)). See also ROTHSTEIN, CRAVER, ET AL., *EMPLOYMENT LAW* (6th ed. 2020) 977 (“[T]he unemployment compensation statutes of all 50 states and the District of Columbia have sought to balance the competing interests by expressly disqualifying only employees who voluntarily terminate their employment without good cause.”).

122. In sexual harassment cases, some courts have required the claimant to complain about the harassment while still employed to collect benefits. *McNabb v. Cub Foods*, 352 N.W.2d 378, 382 (Minn. 1984); *Chapman v. Indus. Comm’n*, 700 P.2d 1099, 1100 (Utah 1985).

123. The United States Supreme Court has defined “constructive discharge” as an “employee’s reasonable decision to resign because of unendurable working conditions” The inquiry is objective: “Did working conditions become so intolerable that a reasonable person in the employee’s position would have felt compelled to resign?” *Pa. State Police v. Suders*, 542 U.S. 129, 141 (2004) (citations omitted and alterations added).

124. See *State Plans*, OCCUPATIONAL SAFETY & HEALTH ADMIN., <https://www.osha.gov/stateplans> [<https://perma.cc/CJ5R-7BFB>] (there are currently twenty-two state or territory plans covering both private sector and state and local government workers and there are six state plans covering only state and local government workers).

125. Maurice Emsellem, *Labor Secretary Scalia Wrongly Rejects Federal Role in Enforcing Unemployment Rights of Workers Who Refuse Unsafe Work*, AM. CONST. SOC’Y (June 23, 2020), <https://www.acslaw.org/expertforum/labor-secretary-scalia-wrongly-rejects-federal-role-in-enforcing-unemployment-rights-of-workers-who-refuse-unsafe-work/> [<https://perma.cc/EK6M-A4SW>]; see also UNITED STATES DEP’T OF LAB.: OCCUPATIONAL SAFETY AND HEALTH ADMIN., WORKERS’ RIGHT TO REFUSE DANGEROUS WORK, <https://www.osha.gov/right-to-refuse.html> [<https://perma.cc/EQT4-8LDA>].

H. State Law Remedies

With the federal government hesitating to act, state law remedies become all the more important. As stated above, twenty-two states or territories operate OSHA state programs covering the private and public sectors that are required to be “at least as effective” as the federal program. They can call for more stringent requirements than federal OSHA.¹²⁶ Given the variation in how COVID-19 has affected different states, states with state plans can engage in innovative approaches to protect workers due to the pandemic.¹²⁷ The variation in state plans was often due to the politics of the states. Thus, states with Democratic administrations have been more stringent than those reporting to Republican governors. Politics again plays a role in enforcement of statutory rights.¹²⁸

Recently, litigators trying to challenge COVID-19 working conditions have done so under state law public nuisance theories. Generally, workers claim that bad working conditions can be a public health threat because of the increasing number of disease vectors in the community.¹²⁹ The theory has so far withstood motions to dismiss in two different courts.¹³⁰

As the foregoing shows, it is the employee who bears the burden of weighing several factors, conditions, and strategies in determining whether to refuse to work in unsafe conditions. And as we have seen, the administrative agencies’ decisions on such matters may be dependent upon

126. Terri Gerstein & Jane Flanagan, *State and Local Labor Standards Enforcement During COVID-19*, ECON. POL’Y INST. (Apr. 28, 2020), https://www.epi.org/publication/state-and-local-labor-standards-enforcement-during-covid-19/#_note2 [<https://perma.cc/2CWY-M7YM>]. The Centers for Disease Control, meanwhile, issued guidance making it easier for essential workers exposed to COVID-19 to get back to work. See CTRS. FOR DISEASE CONTROL & PREVENTION, INTERIM GUIDANCE FOR IMPLEMENTING SAFETY PRACTICES FOR CRITICAL INFRASTRUCTURE WORKERS WHO MAY HAVE HAD EXPOSURE TO A PERSON WITH SUSPECTED OR CONFIRMED COVID-19 (updated Apr. 20, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/critical-workers/implementing-safety-practices.html> [<https://perma.cc/TV8K-5HRB>].

127. For examples of state plan approaches in Michigan, Oregon, New Jersey, Nevada, Virginia and Washington, see UNITED STATES DEP’T OF LAB.: OCCUPATIONAL SAFETY AND HEALTH ADMIN, STATE PLANS, [osha.gov/stateplans](https://www.osha.gov/stateplans) [<https://perma.cc/QV9D-SC6A>].

128. Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1079 (2014).

129. National Labor Relations Board, Basic Guide to the National Labor Relations Act <https://www.nlr.gov/sites/default/files/attachments/pages/node-184/basicguide.pdf> [<https://perma.cc/XK7J-7P99>].

130. Robert Iafolla, *McDonald’s Workers Get Second Win on Virus Safety Protocols (1)*, BLOOMBERG LAW (June 24, 2020), <https://news.bloomberglaw.com/daily-labor-report/mcdonalds-workers-get-second-win-on-virus-safety-protocols> [<https://perma.cc/ULB4-BFME>].

their partisan makeup. Workers, unions, and their advocates must search for new avenues to protect worker health and safety during a pandemic.

I. Picketing

Besides resorting to walkouts and refusals to work, workers may decide to picket businesses which they believe are employing unsafe practices during the pandemic. Like the right to concerted activity, the right to picket over unsafe conditions is protected by the NLRA.¹³¹ However, it is also protected as an individual right under the First Amendment to the Constitution.¹³²

Workers who have a collective bargaining agreement may be prevented from picketing by an operative no-strike clause.¹³³ But health and safety may also be exempt from those provisions under LMRA Section 502 above, if picketing is considered part of the strike.¹³⁴ The employees may decide that the best way to catalyze change is to keep other workers from working in unsafe conditions.¹³⁵ Or they may wish to warn the public that the employer is not engaging in safe practices before members of the public enter the business. Thus, the picketing would have a signaling and communicative impact.¹³⁶

Besides picketing, some unions are engaging innovative techniques to raise attention to employer health and safety practices. For example, the Culinary Workers Union has created a digital space called “Culinary Clean” to rate casino employers in their health and safety practices.¹³⁷

131. *Protected Concerted Activity*, *supra* note 68.

132. *Hague v. Comm. for Indus. Org.*, 307 U.S. 496 (1939); *Thornhill v. Alabama*, 310 U.S. 88 (1940).

133. *See Boys Markets Inc. v. Retail Clerks Union Local 770*, 398 U.S. 235 (1970).

134. *TNS Inc. v. NLRB*, *supra* note 93.

135. DEBORAH BERKOWITZ, *WORKER SAFETY & HEALTH DURING COVID-19 PANDEMIC: RIGHTS & RESOURCES*, NATIONAL EMPLOYMENT LAW PROJECT TOOLKIT (Apr. 9, 2020), <https://www.nelp.org/publication/worker-safety-health-during-covid-19-pandemic-rights-resources/> [https://perma.cc/39MU-UPLU].

136. UNITED STATES DEP'T OF LAB.: OCCUPATIONAL SAFETY AND HEALTH ADMIN, *WORKERS' RIGHT TO REFUSE DANGEROUS WORK*, *supra* note 125.

137. *See* CULINARY WORKERS UNION LOCAL 226, *CULINARY CLEAN: WORKPLACE SAFETY REPORT*, <https://www.culinaryunion226.org/culinary-clean> [https://perma.cc/9A2A-85JP].

J. The Critical Importance of the State

All of the above domestic strategies are based on a single normative point: that workers have a right to expect a safe workplace free of hazardous conditions.¹³⁸ Workers have a critical role in determining for themselves when workplace conditions are unsafe or intolerable. The statutory schemes have been designed to give state and federal authorities primary authority in the protection of workers. The politics of any particular situation has meant that workers cannot always count on governments to protect their safety at work.¹³⁹

At this point, federal OSHA is being heavily criticized for not doing enough to keep workers safe during the pandemic.¹⁴⁰ With thousands of complaints filed from March to July 2020, two citations have been issued against businesses.¹⁴¹ OSHA under Trump was grilled about its lack of virus enforcement and rulemaking.¹⁴² While state OSHA agencies have been more active, federal OSHA has said it will focus virus inspections on sites where there is an “imminent danger.”¹⁴³

138. See UNITED STATES DEP'T OF LAB.: OSHA WORKER RIGHTS AND PROTECTIONS, <https://www.osha.gov/workers> [<https://perma.cc/948K-8JYY>].

139. See U.S. DEP'T OF LAB.: COVID-19 FREQUENTLY ASKED QUESTIONS, <https://www.dol.gov/agencies/eta/coronavirus> [<https://perma.cc/9RDG-FEKC>].

140. Eyal Press, *Safety Last: Trump's Labor Secretary Is a Wrecking Ball Aimed at Workers*, THE NEW YORKER (Oct. 19, 2020), <https://www.newyorker.com/magazine/2020/10/26/trumps-labor-secretary-is-a-wrecking-ball-aimed-at-workers> [<https://perma.cc/A8B5-2FZS>] (discussing the criticisms of AFL-CIO President Richard Trumka, Dr. David Michaels, and Joseph Woodward).

141. Fatima Hussein, *OSHA Issues Second Set of Virus-Related Citations of Pandemic*, BLOOMBERG LAW (July 21, 2020), <https://news.bloomberglaw.com/safety/osha-issues-second-set-of-virus-related-citations-of-pandemic> [<https://perma.cc/9UEL-97B6>] (fining an Ohio health care firm \$40,482 for violating respiratory protection standards; the first one going to George Nursing Home).

142. Bruce Rolfsen, *OSHA Chief Grilled on Virus Enforcement, Lack of Rulemaking (I)*, BLOOMBERG LAW (May 28, 2020), <https://news.bloomberglaw.com/safety/osha-virus-enforcement-gets-house-hearing-scrutiny> [<https://perma.cc/S7D9-H3W2>].

143. Bruce Rolfsen, *OSHA Will Focus Virus Inspections on “Imminent Danger” Sites*, BLOOMBERG LAW (Apr. 14, 2020), <https://news.bloomberglaw.com/safety/osha-will-focus-virus-inspections-on-imminent-danger-sites> [<https://perma.cc/8F54-P8LW>].

III. HUMAN RIGHTS STRATEGIES

A. *The Right to Worker Safety in Trade Agreements*

Multilateral trade and human rights have become increasingly important in recent years, even while several countries have adopted a nationalist stance.¹⁴⁴ In the United States, for example, the USMCA recently went into effect with an enhancement of some of the labor protections in the predecessor North American Free Trade Agreement (NAFTA).¹⁴⁵ As one of the eleven guiding principles, each member country is required to strive to improve the process of “prescribing and implementing standards to minimize the causes of occupational injuries and illnesses.”¹⁴⁶

Since its adoption in 1994, the complaint process under the North American Agreement Labor Cooperation (NAALC) has resulted in several complaints of governments not enforcing their own health and safety laws. One of the early health and safety claims involved the Han Young electronic factory in Tijuana, Mexico.¹⁴⁷ The employees of the plant alleged that the Baja California, Mexico state labor authorities had ensured that the “ghost union,” or employer-friendly, government-protected union was installed to represent the workers. They sought to have their independent union recognized. But they also made a complaint that they were not given the proper PPE to do their jobs working on batteries inside the factory.¹⁴⁸

The National Administrative Office (NAO), a body set up by NAFTA

144. Press Release, Security Council, Rising Nationalism Threatens Multilateralism’s 70-Year ‘Proven Track Record’ of Saving Lives, Preventing Wars, Secretary-General Tells Security Council, U.N. Press Release SC/13570 (Nov. 9, 2018), <https://www.un.org/press/en/2018/sc13570.doc.htm> [<https://perma.cc/8EHE-8GG3>].

145. See Carolyn Bobb, *AFL-CIO Endorses USMCA After Successfully Negotiating Improvements*, AFL-CIO (Dec. 10, 2019), <https://aflcio.org/press/releases/afl-cio-endorses-usmca-after-successfully-negotiating-improvements> [<https://perma.cc/472N-GZJ9>]. (improvements included inspections of facilities that are substandard and closing loopholes that made it harder to prosecute labor violations).

146. North American Agreement on Labor Cooperation, Annex 1, Labor Principle 9, Sept. 13, 1993.

147. Lance Compa, *Trading Away Rights: The Unfulfilled Promise of NAFTA’s Labor Side Agreement*, HUMAN RIGHTS WATCH (Apr. 2001), <https://www.hrw.org/reports/2001/nafta/> [<https://perma.cc/B2FJ-Q8TE>] (discussing Han Young complaint, continued government-to-government talks were also to take place to discuss methods of improving health and safety).

148. Heather L. Williams, *Of Labor Tragedy and Legal Farce: The Han Young Factory Struggle in Tijuana, Mexico*, 27 SOC. SCIENCE HIST. 525 (2003).

to adjudicate disputes, decided that the complaint over the independent union should be dismissed, but acknowledged that there was merit to the workers' health and safety claims.¹⁴⁹ The NAO recommended that ministerial consultations regarding the health and safety issues continue.¹⁵⁰ Although the complaint did not result in sanctions against the government or company in this case, under the agreement, health and safety violations can result in monetary sanctions or penalties if they reach the arbitration stage.¹⁵¹

The NAFTA Labor Side Agreement has been justifiably criticized for failing to live up to its promise.¹⁵² The renegotiation of NAFTA in 2018 and 2019 led to some changes in the side agreements.¹⁵³ There is a continuing debate about whether the new agreement better protects labor rights.¹⁵⁴ Even so, the DOL has regulates HIV as a pathogen of concern.¹⁵⁵ The entire point of NAFTA is to ensure that governments are enforcing their laws on workplace safety. With no airborne infectious disease standard, there is not a strong basis to argue that the DOL is refusing to enforce the laws. The DOL might be required to fully investigate and enforce violations

149. Joe Solomon, *The Results of NAFTA Labor Rights Cases*, in *TRADING AWAY RIGHTS: THE UNFULFILLED PROMISE OF NAFTA'S LABOR SIDE AGREEMENT*, 13 HUM. RTS. WATCH 32, 50 (2001), https://www.hrw.org/reports/2001/nafta/nafta0401-06.htm#P939_155280 [perma.cc/D6N8-TVVM] (“In the Han Young case, the U.S. NAO found consistent and credible evidence that the workplace was ‘polluted with toxic airborne contaminants, strewn with electrical cables running through puddles of water, operating with poorly maintained and unsafe machinery, and with numerous other violations and omissions of minimum safety and health standards.’”).

150. HUMAN RIGHTS WATCH, REPORT, *TRADING AWAY RIGHTS: THE UNFULFILLED PROMISE OF NAFTA'S LABOR SIDE AGREEMENT*, Apr. 2001, Part VI <https://www.hrw.org/reports/2001/nafta/nafta0401-06.htm> [https://perma.cc/8G8C-RVT4].

151. *Id.* at 45 (“Three NAALC complaints have explored this principle: the Washington State apples and DeCoster Egg Farm cases, reviewed by the Mexican NAO, and the Canadian Post case, which the U.S. NAO did not accept for review.”).

152. See Andrea Shalal & David Shepardson, *AFL-CIO's Trumka Says USMCA Is First Step to Undoing Evils of NAFTA*, REUTERS (Dec. 19, 2019), <https://www.reuters.com/article/us-usa-trade-usmca-trumka/afl-cios-trumka-says-usmca-is-first-step-to-undoing-evils-of-nafta-idUSKBN1YO04Q> [https://perma.cc/6HSB-A8UF]; Elizabeth Crandall, *Will NAFTA's North American Agreement on Labor Cooperation Improve Enforcement of Mexican Labor Laws?*, 7 TRANSNAT'L L. 165 (1994).

153. Andrew Chatzky et al., *NAFTA and the USMCA: Weighing the Impact of North American Trade*, COUNCIL ON FOREIGN RELS. (July 1, 2020), <https://www.cfr.org/background/naftas-economic-impact> [https://perma.cc/V62D-P4ML].

154. Robert Kuttner, *Union Busting Under the New NAFTA*, AM. PROSPECT (July 1, 2020), <https://prospect.org/labor/mexico-union-busting-under-the-new-nafta/> [https://perma.cc/GV25-F8C9].

155. *Bloodborne Pathogens and Needlestick Prevention*, OCCUPATIONAL SAFETY & HEALTH ADMIN., <https://www.osha.gov/bloodborne-pathogens> [https://perma.cc/V6DY-99DW].

of the general duty clause. With an emergency standard, though, the DOL could enforce the specific duty clause against businesses that fail to provide a workplace free of hazards.

The USMCA is just one of numerous trade agreements in which the United States has taken on the obligation to enforce its own labor laws.¹⁵⁶ The dispute resolution systems vary, but generally require the complaints to originate from another party to the trade agreement.¹⁵⁷ For example, complaints about the United States failing to enforce its own labor laws must originate in either Mexico or Canada and wind its way through the processes of that country.¹⁵⁸

With the fast-moving nature of the coronavirus pandemic and continually changing plans for returning to work, the processes under these trade agreements may not move fast enough to make change on the ground. Therefore, other avenues should be sought.

B. Human Rights and The Obligations of Government

The human right to health and safety at work is well established in the jurisprudence of the International Labor Organization (ILO). As a member of the ILO, the United States is obliged to follow the core¹⁵⁹ labor rights of the Fundamental Declaration and rights at work.¹⁶⁰ The right to health and

156. Cathleen D. Cimino-Isaacs & M. Angeles Villarreal, *Worker Rights Provisions in Free Trade Agreements (FTAs)*, CONG. RSCH. SERV. (Aug. 23, 2019), <https://fas.org/sgp/crs/misc/IF10046.pdf> [<https://perma.cc/BGR9-L69L>]; Cathleen D. Cimino-Isaacs, *Labor Enforcement Issues in U.S. FTAs*, CONG. RSCH. SERV. (Mar. 2, 2020), <https://fas.org/sgp/crs/row/IF10972.pdf> [<https://perma.cc/3JWK-C7NH>].

157. U.S. DEPARTMENT OF LABOR AFFAIRS, NORTH AMERICAN AGREEMENT ON LABOR COOPERATION: A GUIDE (2005).

158. Agreement Between the United States of America, the United Mexican States and Canada November 20, 2019, as modified by the Protocol of Amendment to the Agreement Between the United States of America, the United Mexican States, and Canada, December 10, 2019. OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between> [<https://perma.cc/54DQ-YQAH>].

159. *International Labour Standards on Occupational Safety and Health*, ILO, <https://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/occupational-safety-and-health/lang--en/index.htm> [<https://perma.cc/PY4Z-5AU3>].

160. “The *ILO Declaration on Fundamental Principles and Rights at Work*, adopted in 1998, makes it clear that these rights are universal, and that they apply to all people in all States - regardless of the level of economic development.” *ILO Declaration on Fundamental Principles and Rights at Work*, ILO, <https://www.ilo.org/declaration/lang--en/index.htm> [<https://perma.cc/9W35-52MM>]; Const. of the Int'l Labour Org., Annex, Declaration Concerning the Aims and Purposes of the

safety is not one of those rights. In the past, this has been controversial.¹⁶¹ Certainly, though, health and safety are fundamental to the right to bargain and have “decent work” in the terms of the ILO initiative.¹⁶² And yet, there remains a gap between the enforcement of international human rights and domestic practice.¹⁶³

The ILO’s founding Constitution in 1919 states that social justice at work includes, for example, “the protection of the worker against sickness” arising out of employment.¹⁶⁴ The Declaration of Philadelphia, issued by the ILO in 1944, made it clear that the principles “should inspire the policy of [ILO] members” in order to achieve “adequate protection for the life and health of workers in all occupations.”¹⁶⁵ The Declaration and the ILO Constitution also contain the important statement: “labour is not a commodity.”¹⁶⁶ Health and safety protections and the other minimum labor standards that all ILO member governments are obliged to uphold ensure that human beings are not treated like inanimate cogs in machines.¹⁶⁷

The United States has expressly ratified even more explicit statements of the obligations of government to protect health and safety at work. The United Nations Declaration of Human Rights, adopted by the United States in 1948, states that “everyone has the right to life, to work, and to free choice of employment, to just and favorable conditions of work and protection against employment.”¹⁶⁸ There are also ILO Conventions 155 and 161 on

International Labour Organization, ILO,
https://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO
[\[https://perma.cc/95J2-2VEM\]](https://perma.cc/95J2-2VEM).

161. *UN Experts Urge ILO to Back Safe and Healthy Work Conditions as a 'Fundamental' Right*, U.N. HUM. RTS. OFF. OF THE HIGH COMM’R (June 13, 2019), <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24695&LangID=E> [\[https://perma.cc/K7T9-69MD\]](https://perma.cc/K7T9-69MD).

162. *See ILO legal instruments*, INTERNATIONAL LABOUR ORGANIZATION, <https://www.ilo.org/global/about-the-ilo/how-the-ilo-works/departments-and-offices/jur/legal-instruments/lang--en/index.htm> [\[https://perma.cc/9SBR-4V8G\]](https://perma.cc/9SBR-4V8G).

163. Virginia A. Leary, *The Paradox of Workers' Rights as Human Rights*, in HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE 22 (Lance A. Compa & Stephen F. Diamond eds., 1996).

164. *Id.* at Preamble.

165. *ILO Declaration of Philadelphia*, ILO, <https://www.ilo.org/legacy/english/inwork/cb-policy-guide/declarationofPhiladelphia1944.pdf> [\[https://perma.cc/VJP9-PWJR\]](https://perma.cc/VJP9-PWJR).

166. *Id.*; Const. of the Int’l Labour Org., Annex, Declaration Concerning the Aims and Purposes of the International Labour Organization, ILO, https://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO [\[https://perma.cc/95J2-2VEM\]](https://perma.cc/95J2-2VEM).

167. *See ILO legal instruments*, *supra* note 160.

168. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, arts. 1) and 23(1), (3) (Dec.

health and safety, though the U.S. has not ratified either of them.¹⁶⁹ The United Nations Covenant on Economic, Social and Cultural Rights (ICESCR), to which the United States is a signatory but has failed to ratify, particularly recognizes that governments must ensure that individuals do not accept dangerous or hazardous work simply out of economic need.¹⁷⁰ The ICESCR further elaborates on governments' obligations to keep workers safe: The ICESCR elaborated further on the promise of dignity in the Universal Declaration, requiring governments to

recognize the right of everyone to the enjoyment of the highest attainable standards of physical and mental health . . . includ[ing] those necessary for: [. . .] the improvement of all aspects of environmental and industrial hygiene . . . the prevention, treatment and control of epidemic, endemic, occupational and other diseases . . . [and] the creation of conditions which would assure to all medical service and medical attention in the event of sickness.¹⁷¹

If there was ever a time for a global human rights response, this global pandemic may be the time.¹⁷²

The pandemic has touched every part of the globe. Works councils in European countries have been instrumental in providing a voice to workers in countries like Germany, Norway, and Sweden.¹⁷³ These bodies work

10. 1948).

169. Solomon, *supra* note 149. Up-to-date Conventions and Protocols Not Ratified by the United States of America. INT'L LABOUR ORG., UP-TO-DATE CONVENTIONS AND PROTOCOLS NOT RATIFIED BY UNITED STATES OF AMERICA, https://www.ilo.org/dyn/normlex/en/f?p=1000:11210:0::NO:11210:P11210_COUNTRY_ID:102871 [<https://perma.cc/9CN4-TEDZ>].

170. Richard Nelsson, *UN adopts Universal Declaration of Human Rights – archive, December 1948*, THE GUARDIAN (Nov. 28, 2018, 4:00PM), <https://www.theguardian.com/law/from-the-archive-blog/2018/nov/28/un-adopts-universal-declaration-human-rights-paris-1948> [<https://perma.cc/84NT-J8RJ>].

171. G.A. Res. 2200A (XXI), art. 12, International Covenant on Economic, Social and Cultural Rights (Dec. 16, 1966) <https://www.ohchr.org/Documents/ProfessionalInterest/cescr.pdf> [perma.cc/BP3K-2MP4].

172. The racial and ethnic disparities inherent in the impact of pandemic raise other human rights concerns and instruments. *See, e.g.*, G.A. Res. 2106 (XX), International Convention on the Elimination of All Forms of Racial Discrimination (Dec. 21, 1969), <https://www.ohchr.org/EN/Issues/Health/Pages/InternationalStandards.aspx> [perma.cc/SRN8-UH44].

173. L. Fulton, *Workplace Representation in Europe*, ETUI (2015), <https://www.worker-participation.eu/National-Industrial-Relations/Across-Europe/Workplace-Representation2> [perma.cc/4DHN-Q93W].

alongside unions to enhance employees' voice in those countries by providing enforcement of sectoral bargaining.¹⁷⁴ Scholars and advocates have argued for similar structures to be established in the United States.¹⁷⁵

Besides these human rights instruments that make working in unsafe conditions an international issue, there is domestic law that casts doubt on the requirement to work during a pandemic. Pursuant to the Defense Production Act (DPA), President Trump required the opening of meatpacking plants even in states where there were stay-at-home orders because meat production was "critical infrastructure."¹⁷⁶ Despite the dubious nature of the President's decision, the DPA provides the authority to override any state orders to the contrary.¹⁷⁷

Since Congress granted the President the authority to declare certain industries essential, Congress can also take that authority away from the President. However, given today's polarized political climate, this is unlikely. Thus, international strategies must be explored.

C. The High Standard to Suspend International Labor Rights

Even when the international standards apply, they may be suspended under extraordinary circumstances. The concept of "force majeure" or "act of god" underlies many of the debates that will arise in many discussions of international human rights.¹⁷⁸ As with domestic contractual rights, force majeure is a defense that depends a great deal on the specific facts of that situation.¹⁷⁹ The key is who has the burden; in contract law, the party

174. Sandrine Cazes, et al. COLLECTIVE BARGAINING SYSTEMS AND WORKERS' VOICE ARRANGEMENTS IN OECD COUNTRIES, <https://www.oecd-ilibrary.org/sites/a6ebacb7-en/index.html?itemId=/content/component/a6ebacb7-en> [https://perma.cc/XAB5-DBDM].

175. I was pleased to contribute to the report, CLEAN SLATE FOR WORKER POWER, WORKER POWER AND VOICE IN THE PANDEMIC RESPONSE, <https://www.cleanslateworkerpower.org/covid-report> [https://perma.cc/RNV2-JR3C], which advocated for COVID Councils at American workplaces; see also BLOCK & SACHS, *supra* note 1.

176. Anshu Siripurapu, *What is the Defense Production Act?*, COUNCIL ON FOREIGN RELS. (Apr. 29, 2020), <https://www.cfr.org/in-brief/what-defense-production-act> [perma.cc/3DKZ-LFKZ].

177. Noah Feldman, *Trump's Coronavirus "Orders" are Just Suggestions*, BLOOMBERG (Apr. 30, 2020), <https://www.bloomberg.com/opinion/articles/2020-04-30/trump-s-coronavirus-orders-are-just-suggestions?sref=jmiDULpC> [https://perma.cc/AWF8-7ESV].

178. Simon Hentrei & Ximena Soley, *Force Majeure*, OXFORD PUB. INT'L L. (Apr. 2011), <https://opil.ouplaw.com/view/10.1093/law/epil/9780199231690/law-9780199231690-e1042> [perma.cc/U245-N8HD].

179. Mayanna Dellinger, *Rethinking Force Majeure in Public International Law*, 37 PACE L. REV. 455, 460–61 (2017) (describing standards of force majeure).

seeking to prove the defense holds this burden.¹⁸⁰

But in international law, the concept of force majeure may be a reason to limit human rights. The question is when the safety problems of the pandemic are more the creation of governments and their leaders rather than “acts of god.”¹⁸¹ As has been shown in numerous countries, although the virus is the same, the actions of leaders have not been. Thus, some countries have dealt with the “force majeure” in better ways than others. As a result, claims that the pandemic requires suspension of rights, as well as broad executive powers, should be looked at critically.¹⁸²

Broad domestic use of executive power is a threat to an international human rights approach to worker safety just as it is to other labor rights. In an emergency situation or when there is a lack of public order, for example, these human rights have been limited.¹⁸³ The freedom of association and the right to strike in the United States have been limited by the national emergency provisions of the Taft-Hartley Act of 1947. When the President of the United States decides that exigencies of national security dictate it, the president may halt labor disputes by petitioning in United States district court for an injunction.¹⁸⁴ This authority has been used sparingly in its first 30 years. President Jimmy Carter petitioned the court to use the authority in 1978 because of the energy crisis.¹⁸⁵ The district court in Washington DC granted the injunction. The labor dispute in the shipping industry was suspended.¹⁸⁶

The Taft-Hartley Act national emergency provisions were not exercised again until the President George W. Bush administration in the aftermath of the September 11, 2001 attacks.¹⁸⁷ In 2002, the unions and the shipping companies of the West Coast ports were embroiled in a labor dispute which

180. *Id.*

181. JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES, 2D ED.

182. Betsy Woodruff Swan, *DOJ seeks new emergency powers amid coronavirus pandemic*, POLITICO (Mar. 21, 2020), <https://www.politico.com/news/2020/03/21/doj-coronavirus-emergency-powers-140023> [<https://perma.cc/AL3W-3LX4>].

183. See Ruben J. Garcia, *Labor's Fragile Freedom of Association Post 9/11*, 8 J. BUS. L. 283 (2006).

184. Pub.L. 80–101, 61 Stat. 136.

185. Dennis Nolan, “WE DIDN’T HAVE TIME TO TRAIN THE MONKEYS! THE 2002 PRESIDENTIAL BOARD OF INQUIRY ON THE WORK STOPPAGE IN THE WEST COAST PORTS, Arbitration 2004: New Issues and Innovations in Workplace Dispute Resolution (2004).

186. *COVID-19 and the world of work*, INTERNATIONAL LABOUR ORGANIZATION, <https://www.ilo.org/global/topics/coronavirus/lang--en/index.htm> [<https://perma.cc/9KP7-9MFM>].

187. 29 U.S.C. § 201.

shut down the ports as they were busy from traffic to the active battlefields of Afghanistan and eventually Iraq.¹⁸⁸ The West Coast Employers Association had locked out the International Longshore and Warehouse Union (ILWU) in an effort to require the union to meet their demands. The lockout had been going for six months when the Bush Administration petitioned for an emergency injunction in the Northern District of California.¹⁸⁹ The Administration argued that the national security of the United States depended on the ports being open, because there were many shipments of military supplies between the West Coast ports and the Middle East.¹⁹⁰ The standard for a Taft-Hartley injunction requires the government to show that the labor dispute “will imperil the national health and safety” of the United States¹⁹¹ While the Government successfully made the requisite showing for the injunction, the Taft-Hartley provisions themselves seem contrary to international protections of the right to strike and freedom of association.¹⁹²

International instruments also cast doubt on the Defense Production Act insofar as it forces workers into unsafe conditions. The Convention against the Worst Forms of Forced Labor, which the United States has ratified, would seem to prohibit ILO member countries from allowing forced labor.¹⁹³

The process would be to file a complaint with the International Labour Organization in Geneva, Switzerland.¹⁹⁴ There have been many complaints filed in the past, including some on health and safety.¹⁹⁵ The chief function of the complaints is to elevate the dialogue about labor rights, since the ILO

188. David E. Sanger & Steven Greenhouse, *PRESIDENT INVOKES TAFT-HARTLEY ACT TO OPEN 29 PORTS*, N.Y. TIMES, Oct. 9, 2002, at A1.

189. Ruben J. Garcia, *Labor's Fragile Freedom of Association*, 8 U. PA. J. LAB. & EMP. L. 283 (2006).

190. REPORT TO THE PRESIDENT: SUBMITTED BY THE PRESIDENT'S BOARD OF INQUIRY ON THE WORK STOPPAGE IN THE WEST COAST PORTS (Oct. 7, 2002), <https://georgewbush-whitehouse.archives.gov/news/releases/2002/10/20021008-2.html> [<https://perma.cc/667Q-HS68>].

191. 29 U.S.C. § 178.

192. See *United States v. Pac. Maritime Ass'n*, 229 F. Supp.2d 1008, 1015–16 (N.D. Cal. 2002).

193. *Id.*

194. HANDBOOK OF PROCEDURES RELATING TO INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS (2019) https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_697949.pdf [<https://perma.cc/PW5K-KJ58>].

195. See, e.g., LANCE COMPA & TEQUILA BROOKS, NAFTA AND NAALC: TWENTY-FIVE YEARS OF NORTH AMERICAN TRADE – LABOUR LINKAGE §§ 219-224 (2d ed. 2019) (describing the Han Young case).

has no power to require governments to comply with its decrees.¹⁹⁶ The ILO has also done Reports and studies of health and safety concerns during COVID-19.¹⁹⁷

Even without the possibility of changing government or employer actions, ILO complaints shine an international and comparative spotlight on the actions of governments. It would be illuminating to see how other countries are handling the same issues. And, since this is a global pandemic, it requires a global response.

D. The Affirmative Obligation of Government to Protect Worker Health and Safety in a Pandemic

With the limits of domestic refusal to work, a new paradigm must be sought. The forced labor conventions can be that new paradigm. In the ILO's Declaration of Fundamental Rights at Work, the prohibition against forced labor is a fundamental convention, which means that all ILO member nations are bound by it.¹⁹⁸

The conditions that the Thirteenth Amendment to the Constitution sought to eradicate included the horrendous health and safety detriments of slavery and involuntary servitude.¹⁹⁹ This is another example of the ways that the Thirteenth Amendment can provide a floor for decent work conditions. The question will be whether this can be operationalized. The Thirteenth Amendment is unique among constitutional provisions in that it imposes affirmative obligations on the government to root out slavery and involuntary servitude wherever it exists in the United States. If health and safety conditions fall below a certain level, they may be considered involuntary servitude—in fact, requiring someone to work in unsafe and even deadly conditions seems to be the quintessence of involuntary

196. INT'L LABOUR ORG., SAFETY AND HEALTH AT WORK, <https://www.ilo.org/global/topics/safety-and-health-at-work/lang--en/index.htm> [https://perma.cc/Y5Z8-3NDW]. See also JAMES A. GROSS, A SHAMEFUL BUSINESS: THE CASE FOR HUMAN RIGHTS IN THE AMERICAN WORKPLACE (2010).

197. COVID-19 and the world of work, *supra* note 184.

198. See INTERNATIONAL LABOUR OFFICE, THE INTERNATIONAL LABOUR ORGANIZATION'S FUNDAMENTAL CONVENTIONS (2002) https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_095895.pdf [https://perma.cc/6ZL2-TMYZ].

199. See, e.g., Lea VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437 (1989); Rebecca Zietlow, *A Positive Right to Free Labor*, 39 Seattle U. L. Rev. 859, 861–62 (2016).

servitude.

At that point, though, the worker may be forced to seek an injunction to stop the dangerous condition, and that may not be feasible.

In the end, the COVID-19 pandemic may affect the conversation about the government's obligations to take care of its citizens, much in the same way that Hurricane Katrina did in 2005.²⁰⁰ Memories are fleeting, however, and many of the same pathologies of race and immigration status that were present during Hurricane Katrina have repeated themselves during the COVID-19 pandemic.²⁰¹ More Black and Brown people have died, and inequalities in health care will continue to disproportionately claim people of color.²⁰²

The way forward is to confront the market imperatives of work for wages with the human right to refuse unreasonably dangerous work without fear of material consequences. It means re-envisioning our "essential" needs and how we meet them. The goal of a safe workplace cannot be achieved as long our priorities remain slanted toward conspicuous consumption. It will also mean overriding draconian executive orders like the one the Trump Administration issued to continue meat production through human rights and constitutional dialogue about the right to refuse unsafe work.²⁰³ Workers need the support of consumers in their efforts.

The idea that there is some work to which employees should not be allowed to consent is rooted in human rights theory.²⁰⁴ As my late mentor Professor Jane Larson wrote with relation to prostitution, consent does not cure work that is "deemed inhumane or irremediably dangerous or injurious

200. Rita Clifton, et al, *Equitable and Just Hurricane Preparedness Amid Covid-19*, *Center for American Progress* (Sept. 30, 2020), <https://www.americanprogress.org/issues/green/reports/2020/09/30/490964/equitable-just-hurricane-disaster-preparedness-amid-covid-19/> [https://perma.cc/77N4-GWAX].

201. Harriette G.C. Van Spall, et al, *Covid-19 and Katrina, Recalcitrant Racial Disparities*, 00 *EUROPEAN HEART JOURNAL* 1 (June 13, 2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7314084/pdf/ehaa488.pdf> [https://perma.cc/9EKL-BX63].

202. For health disparities involving racial groups, see *COVID-19 in Racial and Ethnic Minority Groups*, *CTRS. FOR DISEASE CONTROL & PREVENTION* (June 25, 2020), <http://cdc.gov/coronavirus/2019-ncov/need-extra-precautions/racial-ethnic-minorities.html> [perma.cc/22GA-D3YZ].

203. Jennifer Jacobs & Lydia Mulvany, *Trump Orders Meat Plants to Stay Open in Move Unions Slam*, *BLOOMBERG NEWS* (Apr. 28, 2020), <https://www.bloomberg.com/news/articles/2020-04-28/trump-says-he-s-issuing-order-for-tyson-s-unique-liability> [https://perma.cc/3EVE-2JN4].

204. See, e.g., Jane E. Larson, *Prostitution, Labor and Human Rights*, 37 *U.C. DAVIS L. REV.* 673, 677 (2004).

to the interests of labor as a political class.”²⁰⁵ We need the enforcement agencies of government to critically examine all work to determine whether there is some work that cannot be made safe, and it should be prevented. It remains to be seen whether there is some work that cannot be made safe. At this time, however, federal authorities do not have the authority to shut down a work site. This is why plaintiffs have recently made state law claims under the law of nuisance, so that an injunction might be available to stop the work.²⁰⁶

Practically, it is clear that there is some work in the present crisis that is crucial to survival, whether in health care, food supply, or essential government services. In order to make the vision of human rights a reality, “hazard pay” is not the answer. Employers should not be able to buy out or waive away their obligations to provide a safe workplace. The problem of commodification of labor is one that requires examination.²⁰⁷ Governments need to incentivize employees to refuse hazardous work by providing material support to workers who refuse unsafe conditions. One way to confer such a benefit upon employees is to provide unemployment benefits to any worker who in good faith refuses to work because of unsafe employer practices. Even if the federal government refuses to act in this way, states can legislate protections against retaliation for raising COVID-19 concerns. As Professor Larson wrote, historically, strides have been made to eliminate some of the worst forms of labor since the 19th Century: “Perhaps we, too, can have dreams of that scope.”²⁰⁸

205. *Id.* at 695.

206. William Draper Lewis, *Injunctions Against Nuisances and the Rule Requiring the Plaintiff to Establish his Right at Law*, 56 Pa. L.R. & American Law Register 219 (1908); *see generally* DAN W. DOBBS, *LAW OF REMEDIES* § 2.2, at 58 (2D ED.).

207. On the commodification generally, *see* RETHINKING COMMODIFICATION (MARTHA ERTMAN & JOAN C. WILLIAMS, EDS. 2005).

208. *Id.* at 699.

CONCLUSION

The COVID-19 pandemic has exposed the fault lines of many of the worker protections that are supposed to protect workers. In particular, the rules protecting workers from hazards in the workplace are in need of updating in light of the unprecedented threats that the virus presents to workers, particularly those who interact with the public and work in close proximity to each other. At the same time, most employees are operating without representation and without access to the federal government's support. Thus, new avenues need to be developed. The challenge will be to counter the demands for so-called "essential workers" to sacrifice their safety to work. Once the language of human right is more widely used, there can be greater scrutiny on governments and employers about what they are actually doing to keep all workers safe.

The COVID-19 pandemic will eventually end, though not without a tremendous human and economic toll. The pandemic has also taken a toll on the institutions meant to protect workers. It may also cause a reexamination of the perceived and actual needs of society and the economy to force people into unsafe conditions. The discussion now should be about a new future for dangerous and ultrahazardous work. The pandemic may have bent traditional notions of a risk premium for dangerous work if there ever was one. There may be some work that cannot be made safe during a pandemic, and law will need to adapt.

