

PROTECTING THE PANDEMIC ESSENTIAL WORKER

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I

INTRODUCTION

In March 2020, states and cities tried to slow the spread of the Coronavirus (COVID-19) by issuing shelter-in-place or stay-at-home orders. Once the economic consequences of a total shutdown of the economy became clear, however, the federal government and states declared that certain business sectors or industries were critical. These critical businesses and industries were required (or at least allowed) to remain open. Unfortunately, when businesses told the people we now call “essential workers” to keep working, no one told businesses what they needed to do to protect those workers.

Things initially looked promising for essential workers—at least for some of them. People stood on balconies and lined streets during “clappy hours” to herald and valorize higher income doctors and nurses as they went to and from work. For a brief period, it even seemed that the lower wage employees who scrubbed hospital floors, drove patients to or admitted them to hospitals, stocked shelves in Amazon warehouses, processed meat in factories, picked vegetables on farms, and drove city buses might also be valorized. Essential workers were called heroes and some retail workers even received tips from grateful customers during the early weeks of the pandemic. Later on, many of these low wage, face-to-face (F2F) workers were harassed, assaulted, and even murdered by customers who became enraged when they tried to enforce mask or social distancing requirements put in place to keep customers and workers safe.¹

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1. See Hannah Van Drie & Richard V. Reeves, *Many Essential Workers are in “Low-Prestige” Jobs. Time to Change Our Attitudes – and Policies*, BROOKINGS (May 28, 2020), <https://www.brookings.edu/blog/up-front/2020/05/28/many-essential-workers-are-in-low-prestige-jobs-time-to-change-our-attitudes-and-policies/> [<https://perma.cc/85JV-884M>] (explaining that many essential jobs are considered “low-status” and encouraging a change in perception regarding employment prestige); Neil MacFarquhar, *Who’s Enforcing Mask Rules? Often Retail Workers, and They’re Getting*

Low wage F2F workers largely avoided losing their jobs in the COVID-19 recession. However, the economic benefits did not outweigh the significant health risks they faced when they were required to have close and often prolonged contact with potentially infected co-workers and customers. Businesses generally refused to give them permanent wage increases or provide additional benefits like health insurance, free COVID-19 testing, or paid leave to keep them safe. In fact, though called essential, these workers were treated like they were expendable.

COVID-19's most lethal days may be over, but this will not be the last time low wage essential workers are forced to choose between their livelihood and their lives. The Delta and Omicron variants of COVID-19 and the sustained and often irrational opposition (from some Americans) to simple mask rules and vaccine mandates show the risk of another pandemic occurring. To prepare for the next pandemic, this Article urges federal and state legislative bodies and regulatory agencies to develop pandemic essential worker (PEW) rules that give essential businesses incentives to keep their workers safe.

This Article opens by briefly discussing COVID-19 essentiality declarations in Part II. Part III then describes the typical F2F essential worker: a low wage Black, Indigenous, Person of Color (BIPOC) who does not have a bachelor's degree. Part III notes that the people who can work from home (WFH) are disproportionately white and upper income and that occupationally segregated U.S. workforces posed significant health risks for low wage essential F2F workers during the pandemic. This Part stresses, however, that the social determinants of health (SDOH), *not* skin color or health co-morbidities, caused higher COVID-19 infection and mortality rates for BIPOC workers.

Part IV describes the limited contractual protections low wage essential F2F workers have and shows how being an at-will and non-unionized worker has always made it harder for these workers to convince businesses to implement safety protections. To ensure essential F2F workers who perform jobs that become potentially lethal *because of* essentiality declarations are better protected during the next pandemic, Part V urges state and federal agencies to prepare default PEW regulations that would protect workers. Businesses could adopt those rules or prepare their own PEW protection plan if they negotiate those pandemic workplace safety rules with workers or bargaining units.

Finally, because essential businesses that were allowed to remain open received competitive market advantages over non-essential businesses, Part VI concludes by arguing that they should be taxed on any excess profits they earn during a pandemic. Revenues generated from this tax should be used to pay for pandemic infrastructure—like improved data collection systems—to help close health disparity gaps, and to subsidize the costs smaller or non-essential businesses incur to implement health and safety procedures.

Hurt, N.Y. TIMES (May 15, 2020), <https://www.nytimes.com/2020/05/15/us/coronavirus-masks-violence.html> [<https://perma.cc/Z3RK-8E6D>] (describing instances of violence committed against retail workers enforcing mask mandates).

II

ESSENTIALITY DECLARATIONS

Before March 2020, the phrase essential worker was uncommon and few people—with the possible exception of labor economists and union organizers—spent much time pondering whether any particular form of work should be declared more essential to society than other work. While the term essential worker was rarely used before March 2020, for more than fifty years, U.S. businesses have been declared essential by U.S. presidents. Specifically, the Defense Production Act (DPA) allows Presidents to use their authority to force private businesses to provide materials and services deemed necessary to promote the national defense or to protect or restore critical infrastructure during wartimes.²

Once former President Trump declared on March 16, 2020 that people who “work in a critical infrastructure industry, as defined by the Department of Homeland Security . . . have a special responsibility to maintain [their] normal work schedule,”³ the phrase essential worker became a staple part of our pandemic lexicon.⁴ After this declaration, the Cybersecurity & Infrastructure Security Agency (CISA) of the Department of Homeland Security (DHS) collaborated with other entities to develop an initial list of “Essential Critical Infrastructure Workers” who (1) were vital for public health and safety, (2) ensured economic and national security, and (3) were needed to continue critical infrastructure operations.⁵ Although many state essentiality declarations adopted the categories for essential work found on the CISA list,⁶ the CISA definition was

2. 50 U.S.C. § 4501; 50 U.S.C. § 4502(2). See generally CONG. RSCH. SERV., THE DEFENSE PRODUCTION ACT OF 1950: HISTORY, AUTHORITIES, AND CONSIDERATIONS FOR CONGRESS (2020), <https://fas.org/sgp/crs/natsec/R43767.pdf> [<https://perma.cc/P4MM-YQWZ>] (explaining that the Defense Production Act confers broad authority on the President to influence domestic industries in the interest of national defense).

3. *Memorandum on Identification of Essential Critical Infrastructure Workers During Covid-19 Response*, CYBERSECURITY & INFRASTRUCTURE SEC. AGENCY (Mar. 19, 2020) [hereinafter *Essential Workers Memorandum*], https://www.cisa.gov/sites/default/files/publications/CISA_Guidance_on_the_Essential_Critical_Infrastructure_Workforce.pdf [<https://perma.cc/W3EX-RPTH>].

4. Until March 16, 2020, the phrase “essential worker” was rarely used or searched on Google, but there was an “exponential increase” in the use of that term since March 2020: <https://trends.google.com/trends/explore?date=2020-02-01%202021-10-13&geo=US&q=essential%20worker> [<https://perma.cc/NH9Y-YYPS>]. See Michael Musheno, Birgit Vencill Musheno & Megan Austin, *Exploring the Prevalence and Meaning of Frontline Work in the COVID-19 Era: Implications for Policy Analysis*, 23 J. COMPAR. POL’Y ANALYSIS: RSCH. & PRACTICE 30, 33 (2021) (discussing early pandemic *New York Times* articles that mention frontline and essential workers); Deepa Das Acevedo, *Essentializing Labor Before, During, and After the Coronavirus Pandemic*, 52 ARIZ. ST. L.J. 1091, 1128 (2021) (“Before the spread of COVID-19, essential labor always referred to work that was integral to a hiring entity.”).

5. See *Essential Workers Memorandum*, *supra* note 3 (identifying employment categories considered essential critical infrastructure workers).

6. Most states deemed the following sectors to be essential: grocery/convenience stores; transportation and logistics; health and death care; food and agricultural services; first responders;

non-exclusive, advisory, and was never designed to be a federal directive or standard.⁷

While essential work declarations are not new, a critical difference between prior DPA declarations and COVID-19 essentiality declarations is that COVID-19 declarations transformed generally safe workplaces into potentially lethal ones. In contrast, the safety risks workers faced when they performed jobs at businesses deemed essential in wartime declarations did not increase. The only thing that changed when businesses were deemed essential by other DPA declarations is that workers were required to perform different or new tasks or provide products or services for new entities: the workplace itself did not become unsafe simply because of the DPA declaration.⁸

For example, workers employed by businesses that manufactured fighter, rather than passenger jets, or produced Agent Orange, rather than another agricultural chemical,⁹ faced no additional health or safety risks at work because of DPA declarations. Likewise, essential workers at businesses ordered to produce or deliver bottled water or manufactured homes to the Federal Emergency Management Agency (FEMA) for use in hurricane-ravaged areas faced no additional safety risks.¹⁰ In contrast, although the tasks of stocking shelves, driving buses, picking produce, or admitting patients to a hospital remained the same before and after COVID-19 essentiality declarations, essential workers faced significantly more health risks *because of* the essentiality determination.¹¹ A classic example of a workplace that became measurably more

childcare; and energy/power. Some states also declared liquor stores, golf courses, landscaping companies, and pawnshops essential. *See Reference Chart on State Essential Business Designations*, NAT'L GOVERNORS ASS'N (Apr. 13, 2020), https://www.nga.org/wp-content/uploads/2020/03/Appendix-I-Essential-Business_3.31.20.pdf [<https://perma.cc/K5TW-D2H6>] (collecting orders from state governments declaring certain businesses essential).

7. *Essential Workers Memorandum*, *supra* note 3 (“[I]dentified sectors and workers are not intended to be the authoritative or exhaustive list of critical infrastructure sectors and functions that should continue during the COVID-19 response.”). *See also* Hazard Pay for Essential Workers Act of 2020, H.R. 8349, 116th Cong. § 101(5)(c) (2020) (defining “essential work” as tasks regularly performed in-person by workers who interact with patients, co-workers, or the general public).

8. Some wartime essentiality declarations may have *decreased* safety risks for male essential workers who avoided being sent to war if their labor was needed at home for wartime manufacturing efforts. *See* John W. Jeffries, *Mobilization and Its Impact*, in *WORLD WAR II AND THE AMERICAN HOME FRONT* 9, 21 (Nat'l Historical Landmarks Program ed., 2007), https://www.nps.gov/subjects/nationalhistoricalandmarks/upload/WWII_and_the_American_Home_Front-508.pdf [<https://perma.cc/EMD8-LSH6>] (explaining that essential industrial and agricultural workers received exemptions from the draft).

9. *See Hercules v. United States*, 516 U.S. 417, 417 (1996).

10. *See generally Defense Production Act*, FED. EMERGENCY MGMT. AGENCY, <https://www.fema.gov/disaster/defense-production-act> [<https://perma.cc/RBL3-NVUE>] (discussing FEMA's exercise of the Defense Production Act).

11. Although firefighting and police services are inherently unsafe, the workers who perform these jobs faced greater safety risks when they were required to work near co-workers or members of the public who potentially were infected with COVID-19. Ironically, though police unions opposed vaccine mandates, more police officers died from COVID-19 than any other work-related cause during the pandemic. Mitch Smith, *Hundreds of Police Officers Have Died From Covid. Vaccines Remain a Hard Sell*, N.Y. TIMES (Oct. 12, 2021), <https://www.nytimes.com/2021/10/12/us/police-covid-vaccines.html>

dangerous because of an essentiality declaration involves food processing plants.

Local officials in some areas shut down food processing plants in the early months of the pandemic. In response, former President Trump declared meat and poultry factories to be essential critical infrastructure and required plants to operate in a manner consistent with health and safety guidance issued by the Centers for Disease Control and Prevention (CDC) and the Occupational Safety and Health Agency (OSHA). Some meat and food processing plants tried to enact enhanced health and safety protocols, but OSHA and CDC guidance at that time was vague, minimal, and purely advisory. Businesses were not mandated to provide masks, report workplace outbreaks, or increase ventilation even though these plants had poor ventilation before the pandemic. In the weeks following the essentiality declarations, workers and the residents of the rural communities near those plants had higher COVID-19 infection and mortality rates. In addition, early infection rates for workers, their families, and residents of counties with meatpacking plants were as much as twice as high as the national—and five times the rural—average rate of COVID-19 infections. The mere presence of a large packing facility in an area increased per capita infection or transmission rates by as much as 160 percent.¹²

Not all businesses mistreated their workers or intentionally exposed them to health risks. Nonetheless, businesses regularly discounted the dangers low wage essential workers faced when they were ordered to return to work, and few workers were adequately compensated for the increased risks they assumed when they returned to workplaces because of essentiality declarations.

III

THE DANGERS OF BEING ESSENTIAL

The pandemic affected us all, but all were not equally affected. Workers, whether essential or not, who could perform their jobs in the safety of their homes largely avoided the negative economic and health consequences the pandemic imposed on F2F workers. Indeed, the negative effects the pandemic had on F2F workers relative to people who could WFH revealed the crucial role that occupational segregation plays in making workplaces unsafe for low wage workers.

Just as COVID-19 popularized the term essential worker, the pandemic normalized remote working. Before the pandemic, roughly twenty percent of people were allowed to routinely perform their jobs in their homes, but that

[<https://perma.cc/SB5H-HW76>].

12. Thomas McGarity, Michael C. Duff & Sidney Shapiro, *Protecting Workers in a Pandemic: What the Federal Government Should be Doing*, CTR. FOR PROGRESSIVE REFORM 7–9, 13–14 (June 2020), <http://progressivereform.org/our-work/workers-rights/protecting-workers-in-a-pandemic/> [<https://perma.cc/DL7V-WQ23>]; Trey Malone, K. Aleks Schaefer & Felicia Wu, *The Razor's Edge of "Essential" Labor in Food and Agriculture*, 43 APPLIED ECON. PERSP. & POL'Y 368, 369 (2021); Tina L Saitone, K. Aleks Schaefer & Daniel P. Scheitrum, *COVID-19 Morbidity and Mortality in U.S. Meatpacking Counties*, FOOD POL'Y, no. 101, May 2021, at 7.

number soared to roughly seventy percent in the early months of the pandemic.¹³ There are significant demographic differences between people who could WFH during the pandemic and F2F workers. While some upper income professionals, including doctors, registered nurses, pharmacists, and bankers, were required to work F2F and some lower wage workers could safely WFH, higher wage workers were more than twice as likely to report being able to WFH compared to lower wage workers.¹⁴ Additionally, college graduates and whites were more likely than non-college workers, Blacks and Latinos to have the ability to WFH.¹⁵

Although not all WFH jobs are high income, essential F2F workers generally earn less than twenty dollars per hour, struggle to pay their monthly expenses, and often hold multiple jobs.¹⁶ BIPOC and female workers, whether essential or not, are *overrepresented* in low wage sectors including restaurants, leisure and hospitality, and other industries hit hardest by the COVID-19 recession. In contrast, they are *underrepresented* in high wage industries like finance, telecommunications, and information technology, which were less impacted by the COVID-19 recession.¹⁷ Because of occupational segregation, BIPOC workers had higher unemployment rates during the pandemic and the jobs they had were less likely to provide what workers needed the most during the pandemic: health insurance and paid leave.¹⁸ Indeed, one reason COVID-19 infection and

13. Kim Parker, Juliana Menasche Horowitz & Rachel Minkin, *How the Coronavirus Outbreak Has – and Hasn't – Changed the Way Americans Work*, PEW RSCH. CTR. (Dec. 9, 2020), <https://www.pewresearch.org/social-trends/2020/12/09/how-the-coronavirus-outbreak-has-and-hasnt-changed-the-way-americans-work/?=1> [<https://perma.cc/G9A4-T83A>].

14. Fifty-six percent for higher wage workers compared to twenty-four percent for lower wage workers were able to WFH. *Id.*; *Report on the Economic Well-Being of U.S. Households in 2019*, BD. GOVERNORS FED. RSRV. SYS. 54 (May 2020), <https://www.federalreserve.gov/publications/files/2019-report-economic-well-being-us-households-202005.pdf> [<https://perma.cc/9HQN-N9KN>].

15. Fifty-eight percent for college graduates, thirty-nine percent for whites, seventeen percent for workers with a high school diploma or less, thirty-seven percent for Blacks, and twenty-nine percent for Latinos. Parker et al., *supra* note 13.

16. See Molly Kinder & Laura Stateler, *Essential Workers Comprise About Half of All Workers in Low-Paid Occupations. They Deserve a \$15 Minimum Wage*, BROOKINGS (Feb. 5, 2021), <https://www.brookings.edu/blog/the-avenue/2021/02/05/essential-workers-deserve-minimum-wage-increase/> [<https://perma.cc/2DQY-ZLDY>] (discussing the economic conditions and financial struggles faced by many essential workers).

17. Aaron Klein & Ariel Gelrud Shiro, *The COVID-19 Recession Hit Latino Workers Hard. Here's What We Need to Do*, BROOKINGS (Oct. 1, 2020), <https://www.brookings.edu/blog/how-we-rise/2020/10/01/the-COVID-19-recession-hit-latino-workers-hard-heres-what-we-need-to-do/> [<https://perma.cc/AMN6-R6VQ>] (“Latino workers are disproportionately concentrated in industries more deeply impacted by the recession (restaurants, hotels, construction) . . . they are underrepresented in the industries least impacted (finance, telecom, information)”); see also Laura Sullivan, Tatjana Meschede, Thomas Shapiro, Teresa Kroeger & Fernanda Escobar, *Not Only Unequal Paychecks: Occupational Segregation, Benefits, and the Racial Wealth Gap*, INST. ON ASSETS & SOC. POL'Y 4–9 (Apr. 2019), https://heller.brandeis.edu/iere/pdfs/racial-wealth-equity/asset-integration/occupational_segregation_report_40219.pdf [<https://perma.cc/QL9F-YPXW>] (examining that effects of economic segregation, including the overrepresentation of women and BIPOC in low-wage careers).

18. Hye Jin Rho, Hayley Brown & Shawn Fremstad, *A Basic Demographic Profile of Workers in Frontline Industries*, CTR. ON ECON. & POL'Y RSCH. 3–9 (Apr. 2020), <https://cepr.net/wp-content/uploads/2020/04/2020-04-Frontline-Workers.pdf> [<https://perma.cc/B5W5-VE3U>] (noting that

mortality rates for lower wage F2F essential workers were higher than rates for other workers is because so few of them had paid leave.

Some businesses offered their F2F health care workers sick leave in lieu of higher wages and some state or local governments, typically at the urging of labor unions, passed laws that mandated temporary hazardous pay for frontline workers.¹⁹ But even workers who had the right to paid or unpaid leave often were discouraged from using that leave, including some F2F essential *health care* workers who suspected they were infected with COVID-19 but were encouraged or ordered to remain at work or to work additional hours to cover for co-workers who quit, got sick, or died from the virus. Workers were encouraged to return to work despite the risk their presence posed to unsuspecting co-workers or patients.²⁰ While some essential workers chose to quit their jobs rather than risk

women and BIPOC are overrepresented in frontline industries and explaining that frontline workers are often uninsured); David U. Himmelstein & Steffie Woolhandler, *Health Insurance Status and Risk Factors for Poor Outcomes With COVID-19 Among U.S. Health Care Workers: A Cross-Sectional Study*, 173 ANNALS INTERNAL MED. 410, 411 (2020) (presenting statistics on the lack of paid sick leave and health insurance among frontline healthcare workers); *see also* Celine McNicholas, Lynn Rhinehart, Margaret Poydock, Heidi Shierholz, & Daniel Perez, *Why Unions Are Good for Workers—Especially in a Crisis Like COVID-19: 12 Policies That Would Boost Worker Rights, Safety, and Wages*, ECON. POL'Y INST. 5 (Aug. 25, 2020), <https://files.epi.org/pdf/204014.pdf> [<https://perma.cc/2NUT-UC4T>] (reporting that low-wage workers are roughly half as likely to have paid sick leave as high wage workers and that Black workers are sixty percent more likely to be uninsured than white workers). Blacks have low insurance rates and seven of the ten states with the highest Black populations chose not to expand Medicaid. *See* Vann R. Newkirk II, *America's Health Segregation Problem*, THE ATLANTIC (May 16, 2016), <https://www.theatlantic.com/politics/archive/2016/05/americas-health-segregation-problem/483219/> [<https://perma.cc/RF4N-FVXA>] (noting that Blacks constituted thirty percent of people who do not have affordable health care options).

19. McGarity et al., *supra* note 12, at 16–17; Lisa Dubay, Joshua Aarons, K. Steven Brown & Genevieve M. Kenney, *How Risk of Exposure to the Coronavirus at Work Varies by Race and Ethnicity and How to Protect the Health and Well-Being of Workers and Their Families*, URB. INST. 22–23 (Dec. 2, 2020), <https://www.urban.org/research/publication/how-risk-exposure-coronavirus-work-varies-race-and-ethnicity-and-how-protect-health-and-well-being-workers-and-their-families> [<https://perma.cc/5QFP-EEE9>]; James J. Brudney, *Forsaken Heroes: COVID-19 and Frontline Essential Workers*, 48 FORDHAM URB. L.J. 1, 28–29 (2020) (discussing range of temporary hazard pay measures local and state governments enacted); Michelle Long & Matthew Rae, *Gaps in the Emergency Paid Sick Leave Law for Health Care Workers*, KAISER FAMILY FOUND. (Jun. 17, 2020) <https://www.kff.org/coronavirus-COVID-19/issue-brief/gaps-in-emergency-paid-sick-leave-law-for-health-care-workers/> [<https://perma.cc/E9K4-S474>]. Market forces ultimately caused businesses to make permanent wage increases because they struggled to entice existing workers to return or to attract new workers. Similarly, the Biden Administration's Department of Agriculture created a program in September 2021 that provided grants to reimburse farmworkers, meatpacking workers, and front-line grocery workers for the money they spent to pay for PPE, COVID testing, dependent care, and other quarantine related expenses. Andrew Van Dam & Heather Long, *For the First Time, Average Pay for Supermarket and Restaurant Workers Tops \$15 an Hour*, WASH. POST (Aug. 8, 2021), <https://www.washingtonpost.com/business/2021/08/08/fifteen-dollar-wage/> [<https://perma.cc/HZH8-GXJN>] (explaining that competition for workers has forced employers to increase wages); *USDA Invests \$700 Million in Grants to Provide Relief to Farm and Food Workers Impacted by COVID-19*, U.S. DEPT. AGRICULTURE, <https://www.usda.gov/media/press-releases/2021/09/07/usda-invests-700-million-grants-provide-relief-farm-and-food> [<https://perma.cc/6UFL-QX9L>].

20. *See* Noam Scheiber & Michael Corkery, *Missouri Pork Plant Workers Say They Can't Cover Mouths to Cough*, N.Y. TIMES (April 24, 2020), <https://www.nytimes.com/2020/04/24/business/economy/coronavirus-smithfield-meat.html?smid=tw->

contracting COVID-19 or taking the disease home to their households, quitting posed significant risks for most low wage F2F workers as doing so potentially made them ineligible to receive unemployment benefits.²¹

Older adults, particularly if they lived in congregant facilities, had the highest mortality rates during COVID-19 (Alpha), but BIPOCs of all ages were disproportionately affected by COVID-19 during the earliest months of the pandemic.²² Rather than skin color, biology, or co-morbidities like asthma, chronic obstructive pulmonary disease, heart disease, and diabetes, however, the SDOH explain why low wage BIPOC workers had disproportionately high COVID-19 infection and mortality rates. Specifically, the SDOH exist outside of individual genes or behavior and encompass where people are “born, live, learn, work, play, worship, and age.”²³

Pre-pandemic social inequalities made it more likely that lower income essential F2F workers, particularly those that are Black and Latino, would face greater safety risks during the pandemic, as their workplace injury and fatality rates were higher even before the pandemic.²⁴ Indeed, one reason COVID-19 infection and mortality rates for higher income essential workers did not differ significantly from overall infection rates is because they could reduce their COVID-19 risks by buying personal protective equipment (PPE) or paying for COVID-19 testing. Higher income workers could also take paid or unpaid leave to avoid returning to a workplace they felt was unsafe. Likewise, higher wage workers who suspected they had been exposed to COVID-19 could use paid leave to see a doctor or get tested for COVID-19 and, if they contracted the virus,

share [<https://perma.cc/W7WF-44YZ>] (“In March, Smithfield announced that workers in Milan would receive a \$500 bonus if they worked every shift they were scheduled for from April 1 to May 1. According to the complaint, this has given workers an incentive to show up “even when they are experiencing symptoms,” though the company later said that workers who missed time because of Covid exposure would still receive the money.”).

21. Eli Rosenberg & Hannah Knowles, *They Quit Rather Than Risk Covid at Work. Now They're Hoping Biden Can Help Them Collect Unemployment*, WASH. POST (Feb. 8, 2021), <https://www.washingtonpost.com/business/2021/02/08/executive-order-refuse-work-unemployment/> [<https://perma.cc/8R79-6BJ2>].

22. *Inequities Exposed: How COVID-19 Widened Racial Inequities in Education, Health, and the Workforce: Hearing before the H. Comm. on Education and Labor*, 116th Cong. 3–4 (2020) (testimony of Camara Phyllis Jones). By November 2021, COVID infection rates were higher for whites because they were disproportionately more likely to be unvaccinated. Nambi Ndugga, Latoya Hill, Samantha Artiga & Sweta Haldar, *Latest Data on COVID-19 Vaccinations by Race/Ethnicity*, KAISER FAMILY FOUND. (Dec. 2, 2021), <https://www.kff.org/coronavirus-covid-19/issue-brief/latest-data-on-covid-19-vaccinations-by-race-ethnicity/> [<https://perma.cc/5L7S-VBJC>].

23. *Social Determinants of Health*, OFF. DISEASE PREVENTION & HEALTH PROMOTION, <https://health.gov/healthypeople/objectives-and-data/social-determinants-health> [<https://perma.cc/3JYG-6WL4>].

24. AFL-CIO, DEATH ON THE JOB: THE TOLL OF NEGLECT 7 (2021); *Victory for Strauss Workers, VOCES DE LA FRONTERA* (Aug. 17, 2020), <https://vdlf.org/victory-for-strauss-workers/> [<https://perma.cc/DXK5-9TL7>] (discussing settlement for workers terminated for reporting employer's lack of COVID-19 protections); Tiana N. Rogers, Charles R. Rogers, Elizabeth VanSant Webb, Lily Y. Gu, Bin Yan & Fares Qeadan, *Racial Disparities in COVID 19 Mortality Among Essential Workers in the United States*, WORLD MED. HEALTH POL'Y 318–19 (Aug. 5, 2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7436547/> [<https://perma.cc/587R-BR3Q>].

could use paid or unpaid leave to recover.²⁵ Essential F2F workers had a fifty-five percent higher likelihood of becoming positive with COVID-19 relative to their non-essential counterparts.²⁶ In addition, it was harder for essential F2F workers to protect their health because many could not take time off to get tested or vaccinated.

Although Blacks and Latinos were no more likely than whites to be hospitalized and hospitalized Black COVID-19 patients actually had slightly lower risks of dying, the SDOH caused BIPOC essential workers to have disproportionately higher COVID-19 infection rates.²⁷ For example, low wage Blacks are more likely to live in neighborhoods near polluting industries, and air and water quality is lower in their neighborhoods. Further, low wage Blacks typically live in neighborhoods that lack healthy food options, have minimal green space, and are health care “deserts,” which made it hard for them to find convenient COVID-19 testing and vaccine distribution sites.²⁸ Because of lower overall household income, low wage BIPOC workers are more likely to use public transportation where social distancing was often impossible.²⁹ Likewise, low wage BIPOC workers are more likely to live with essential workers and to live in crowded or intergenerational households where it is harder to engage in social distancing.³⁰

25. Elizabeth S. McClure, Pavithra Vasudevan, Zinzi Bailey, Snehal Patel & Whitney R. Robinson, *Racial Capitalism Within Public Health—How Occupational Settings Drive COVID-19 Disparities*, 189 AMER. J. EPIDEMIOLOGY 1244, 1245 (2020) (detailing risks to lower income health workers during the early pandemic due to inadequate PPE); McNicholas et al., *supra* note 18 (noting that low-wage workers are half as likely to have paid sick leave as high wage workers). Some low-wage F2F retail workers used their own money to buy the PPE they sold in stores to customers. Daniel Schneider & Kristen Harknett, *Essential and Unprotected: COVID-19-Related Health and Safety Procedures for Service-Sector Workers*, THE SHIFT PROJECT (May 2020), <https://shift.lks.harvard.edu/essential-and-unprotected-COVID-19-related-health-and-safety-procedures-for-service-sector-workers/> [<https://perma.cc/33TV-YLHQ>].

26. Hummy Song, Ryan M. McKenna, Angela T. Chen, Guy David & Aaron Smith-McLallen, *The Impact of the Non-essential Business Closure Policy on COVID-19 Infection Rates*, 21 INT. J. HEALTH ECON. MGMT. 387, 389 (2021).

27. Alan P. Pan, Osman Khan, Jennifer R. Meeks, Marc L. Boom, Faisal N. Masud, Julia D. Andrieni, Robert A. Phillips, Yordanos M. Tiruneh, Bitu A. Kash & Farhaan S. Vahidy, *Disparities in COVID-19 Hospitalizations and Mortality Among Black and Hispanic Patients: Cross-Sectional Analysis From the Greater Houston Metropolitan Area*, BMC PUB. HEALTH, <https://bmcpubhealth.biomedcentral.com/articles/10.1186/s12889-021-11431-2> [<https://perma.cc/8Q5F-HESN>]; David U. Himmelstein & Steffie Woolhandler, *Health Insurance Status and Risk Factors for Poor Outcomes With COVID-19 Among U.S. Health Care Workers: A Cross-Sectional Study*, 173 ANNALS INTERNAL MED. 410, 411 (2020); Dubay et al., *supra* note 19, at 2.

28. Ravina Kullar, Jasmine R. Marcelin, Talia H. Swartz, Damani A. Piggott, Raul Macias Gil, Trini A. Mathew & Tina Tan, *Racial Disparity of Coronavirus Disease 2019 in African American Communities*, 222 J. INFECTIOUS DISEASES 890, 891 (2020).

29. Dubay et al., *supra* note 19, at 14.

30. Dubay et al., *supra* note 19, at 20. Counties where people were likely to live in crowded households had higher COVID-19 mortality rates than counties with fewer crowded households. Likewise, people who lived with an essential worker were more likely to contract COVID than people who did not live with essential workers. Yea-Hung Chen, Maria Glymour, Alicia Riley, John Balmes, Kate Duchowny, Robert Harrison, Ellicott Matthay & Kirsten Bibbins-Domingo, *Excess Mortality Associated with the COVID-19 Pandemic Among Californians 18–65 Years of Age by Occupational Sector and Occupation March Through November 2020*, NAT'L LIBRARY MED. 1 (June 2021),

When BIPOC and lower income workers became or suspected they were infected with COVID-19, they struggled to find convenient testing as, initially, most testing sites were located in doctor's offices, retail pharmacies, and other sites in higher income neighborhoods that often were not accessible by public transportation.³¹ Additionally, both COVID-19 testing and vaccine appointments initially were available only online and during regular business hours. While higher income workers, whether essential or not, could take time off work to book and attend appointments, low wage essential workers were reluctant to get tested or vaccinated if they lacked paid leave. Likewise, low wage essential workers rarely had the luxury of remaining in the early online vaccine scheduling "lines" for long periods because they needed to go to sleep (to get ready for work) and because many lacked stable internet access.³²

Finally, the SDOH and occupational segregation contributed to early race and economic vaccine disparities. Specifically, some state vaccine eligibility rules initially prioritized frontline medical workers, like doctors and nurses, and the elderly. These state eligibility rules contributed to higher BIPOC infection and mortality death rates because, although older people, doctors, and nurses had the highest infection and mortality rates, these prioritized groups are disproportionately white. In contrast, lower wage essential workers, who often had to wait to get vaccinated, were disproportionately non-white.³³

IV

WORKFORCE PROTECTIONS FOR THE ESSENTIAL WORKER

OSHA's "general duty" clause requires workforces to be "free from recognized hazards that are causing or are likely to cause death or serious

<https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0252454> [https://perma.cc/AV8R-37FH].

31. Tonia Poteat, Gregorio A Millett, LaRon E Nelson & Chris Beyrer, *Understanding COVID-19 Risks and Vulnerabilities Among Black Communities in America: The Lethal Force of Syndemics*, 47 ANNALS EPIDEMIOLOGY 1, 2 (2020); see also Wendi C. Thomas & Hannah Grabenstein, *People Over 75 Are First in Line to Be Vaccinated Against COVID-19. The Average Black Person Here Doesn't Live That Long*, PROPUBLICA (Feb 12, 2021, 11:30 AM), <https://www.propublica.org/article/people-over-75-are-first-in-line-to-be-vaccinated-against-covid-19-the-average-black-person-doesnt-live-that-long> [https://perma.cc/P8MS-N2U6] (discussing the relative inaccessibility of vaccines in less affluent and primarily Black communities).

32. Thomas & Grabenstein, *supra* note 31. BIPOC vaccination rates also lag overall rates because BIPOC individuals often do not know where or when to get the vaccine. *COVID-19 Vaccine Access and Confidence Survey*, ROCKEFELLER FOUND. 6 (2021), <https://www.rockefellerfoundation.org/report/covid-19-vaccine-access-and-confidence-survey/> [https://perma.cc/Q56Q-SGJU].

33. Samantha Artiga & Jennifer Kates, *Addressing Racial Equity in Vaccine Distribution*, KFF (Dec. 3, 2020), <https://www.kff.org/racial-equity-and-health-policy/issue-brief/addressing-racial-equity-vaccine-distribution/> [https://perma.cc/GJU3-8Y4J]. Older residents of long-term care facilities (nursing homes and assisted living communities) comprise about one percent of the U.S. population but constituted roughly forty percent of COVID-19 deaths. *People Who Live in a Nursing Home or Long-Term Care Facility*, CTRS. DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-in-nursing-homes.html> [https://perma.cc/LSB4-T888].

physical harm” and requires businesses to use feasible means to eliminate or materially reduce hazards.³⁴ Despite this clause, businesses told lower wage F2F essential workers to return to potentially unsafe workforces with no guarantee they would receive PPE, be tested for COVID-19, or even be told about infection or mortality rates involving co-workers.³⁵ Workers who raised safety concerns, expressed reluctance about returning to work, disclosed they had COVID-19, or attempted to stay home because they had or feared they had COVID-19 were often reprimanded or threatened with termination or, if they were immigrant workers, feared they would be deported.³⁶ Few essential workers could demand that businesses keep them safe during the pandemic because decades of occupational segregation have created a large “supply of low wage workers of color who do not have the power and resources to demand workplace protections or leave the high-hazard jobs.”³⁷

Low wage essential workers rarely have employment contracts and are instead at-will employees who can be fired without warning for good cause, bad cause, or no cause at all assuming the termination does not violate federal or state labor or anti-discrimination laws. As at-will workers, essential F2F workers had virtually no employment security or stability during the pandemic and businesses could (and did) unilaterally change the terms of their employment, including decreasing their wages or hours and eliminating employee benefits. Businesses could also fire essential workers who refused to return to work or who refused to

34. 29 U.S.C. § 654(a)(1).

35. See Danielle Wiener-Bronner, *Managers at Tyson Meat Plant Had Betting Pool on How Many Workers Would Get Covid, Lawsuit Alleges*, CNN BUS. (Nov. 19, 2020), <https://www.cnn.com/2020/11/19/business/tyson-coronavirus-lawsuit/index.html> [https://perma.cc/R9SK-UHJN] (“In one case, the suit said, he stopped a supervisor who was going to get tested and told him ‘we all have symptoms — you have a job to do.’”); Nicole Greenfield, *COVID-19 Has Exposed the Gross Exploitation of Meatpacking Workers*, NRDC (Oct. 30, 2020), <https://www.nrdc.org/stories/covid-19-has-exposed-gross-exploitation-meatpacking-workers> [https://perma.cc/62WU-VPHC] (stating that employees were not given masks or told about exposures at work). Counties in or near meatpacking plants had disproportionately high COVID infection rates in part because workers were not initially told that they had been in close contact with an infected co-worker. Hiding infection rates posed health risks to the unsuspecting public, including members of the workers’ households and others who come in close contact with them. Amazon recently agreed to pay a \$500,000 penalty for claims that it concealed COVID-19 case numbers from its workers in violation of California’s “right to know” workplace safety law. Suhauna Hussain, *Amazon to Pay California \$500,000 for ‘Concealing’ COVID Cases Among Workers*, L.A. TIMES (Nov. 15, 2021, 1:24 PM), <https://www.latimes.com/business/story/2021-11-15/amazon-covid-outbreak-workplace-safety-right-to-know-penalty> [https://perma.cc/8G76-W39K].

36. See Haven Orecchio-Egresitz, *A Work-While-Sick Culture and Lack of Safeguards at Meat Plants has Employees Fearing for Their Lives*, BUS. INSIDER (May 6, 2020), <https://www.businessinsider.com/few-safeguards-meat-plant-workers-live-in-fear-2020-5> [https://perma.cc/DB6D-QACB] (“‘They have really strict attendance policies, and they’re only given so many days off before you’re terminated,’ Cordova said. ‘Workers are less likely to report illnesses because they have to make a decision on whether to face financial devastation or to go to work sick.’”); Kelly K. Dineen, *Meat Processing Workers and the COVID-19 Pandemic: The Subrogation of People, Public Health, and Ethics to Profits and a Path Forward*, 14 ST. LOUIS U. J. HEALTH L. & POL’Y (2020) (“Participants also were reluctant to seek medical care because of health care costs, lack of insurance, and fears of immigration enforcement and deportation.”).

37. McClure et al., *supra* note 25, at 1245.

work additional hours to cover for co-workers who contracted or died from COVID-19.³⁸

Another reason essential F2F workers faced higher COVID-19 infection and mortality risks was because most were not members of bargaining units. While some individual worker groups staged walkouts during the pandemic to protest unsafe working conditions, worker bargaining power has eroded since the 1980s. For example, the percentage of workers who were members of unions in 2020 was 10.8 percent compared to the 20.1 percent in 1983.³⁹ Some essential workers who were protected by collective bargaining agreements, like flight attendants and communication workers, had job security, health insurance, and sick or other paid or unpaid leave. However, even those workers could not threaten to strike to force their employers to improve workplace safety because of the no-strike clauses in the collective bargaining agreements that prevented work stoppages or slowdowns outside of contract negotiation periods.⁴⁰

Another reason low wage essential workers could not effectively bargain with businesses during the pandemic was because businesses increasingly hire independent contractors or contract with staffing agencies who provide full-time temporary workers. Likewise, there has been a dramatic increase in businesses,

38. See Kate Andrias & Alexander Hertel-Fernandez, *Ending At-Will Employment: A Guide For Just Cause Reform*, ROOSEVELT INST., 20–22 (Jan. 19, 2021), <https://rooseveltinstitute.org/publications/ending-at-will-employment-a-guide-for-just-cause-reform/> [<https://perma.cc/5X2V-XFJV>] (discussing how at-will employment erodes workplace protections). Another non-COVID example of the limited bargaining power of essential workers involves the work conditions that existed in December 2021 when deadly tornadoes ripped through Kentucky and Illinois. Though Amazon and low-wage workers (including inmate labor) knew the tornadoes were approaching and understood they were working in unsafe facilities, they were told to remain at work or risk losing their jobs. Will Bunch, *Tornadoes Ripped the Roof Off American Capitalism*, PHILA. INQUIRER (Dec. 14, 2021), <https://www.inquirer.com/columnists/attytood/tornado-amazon-kentucky-20211214.html> [<https://perma.cc/258B-RS26>].

39. *Union Members Summary*, U.S. BUREAU LAB. STATS., <https://www.bls.gov/news.release/union2.nr0.htm>; see Jay Shambaugh & Ryan Nunn, *Why Wages Aren't Growing in America*, HARV. BUS. REV., (Oct 24, 2017), <https://hbr.org/2017/10/why-wages-arent-growing-in-america> [<https://perma.cc/2MY9-J6PJ>] (noting that declining union membership is a factor in deteriorating wages). The increased number of strikes by workers seeking higher wages, better benefits, and improved working conditions and the number of workers who quit their jobs in record numbers in 2021 triggered the surge in labor activity dubbed “striketober.” Ailsa Chang, Alejandra Marquez Janse & Courtney Dorning, ‘*Striketober*’ Could Have Lasting Impact on Labor, NAT. PUB. RADIO (Oct. 28, 2021, 4:28 PM), <https://www.npr.org/2021/10/28/1050177227/striketober-could-have-lasting-impact-on-labor> [<https://perma.cc/DC8G-4LCR>]. Unionization did not increase during the pandemic, but recent opinion polls show that show public approval of unions has reached the highest point (sixty-eight percent) since 1965 (seventy-one percent). Megan Brenan, *Approval of Labor Unions at Highest Point Since 1965*, GALLUP (Sept. 2, 2021), <https://news.gallup.com/poll/354455/approval-labor-unions-highest-point-1965.aspx> [<https://perma.cc/J2YV-3M6Z>].

40. AFL-CIO, *supra* note 24, at 7. Similarly, even unionized immigrant workers were reluctant to complain about unsafe working conditions during the pandemic if they were undocumented and feared deportation. *But see* Memorandum from Alejandro N. Mayorkas, Sec’y, Dep’t of Homeland Sec., to Tae D. Johnson, Acting Dir., U.S. Immigration & Customs Enforcement 3 (Oct. 12, 2021), https://www.dhs.gov/sites/default/files/publications/memo_from_secretary_mayorkas_on_worksite_enforcement.pdf [<https://perma.cc/H322-RWL7>] (order directing DHS to consider showing leniency for undocumented workers who are witnesses to business labor violations).

like Lyft and Uber, that are built on a model that intentionally uses workers who are not classified as direct employees and who receive no employee benefits. This shift has diluted worker bargaining power in general and has directly weakened union strength because only direct statutory employees can join bargaining units.⁴¹ Temporary and contracted workers often were not told if they had worked near a direct employee who tested positive for COVID-19 because of staffing firms' desire to keep their contracts with their clients. The fear of losing clients gave contracting firms an incentive to ignore the safety risks their workers faced and made them unwilling to demand that their clients disclose workforce COVID-19 infections or mortality rates.⁴²

Low wage essential workers had no power to demand that large essential businesses share the enormous corporate profits they earned during the pandemic, even though worker productivity soared during the pandemic. Rather than give essential workers their fair share of those profits, corporations chose to distribute profits to shareholders or increase the salaries of corporate executives, even though essential workers made those profits possible and made it possible for higher income workers to safely WFH. For example, the CEOs of firms like DoorDash, which rely heavily on F2F gig workers, were handsomely compensated during the pandemic, and compensation for executives of companies that essentially shuttered during the pandemic, like airplane manufacturers, hotels, and cruise lines, also rose during the pandemic.⁴³

Average pay for frontline essential retail workers increased by roughly ten percent during the early months of the COVID-19 (Alpha) pandemic.⁴⁴ In

41. See *Preserving Worker Protections in the Modern Economy: Hearing on the Future of Work Before the H.R. Comm. On Educ. & Lab., Subcomm. on Health, Emp., Lab. & Pensions., Subcomm. on Workforce Protections*, 116th Cong. 9–10 (2019) (Statement of Brishen Rogers, Associate Professor at Temple Law School) (describing work fissure arrangements in which workers lose the right to strike). Temporary workers performed work declared essential during the pandemic but had no right to receive employee benefits, like paid leave or health insurance, even if they performed the same work as direct employees. Miriam A. Cherry, *Employment Status for “Essential Workers”: The Case for Gig Worker Parity*, 55 LOY. L.A. L. REV. 21 (forthcoming 2022). The “fissuring of the workplace” has caused substantially reduced worker bargaining power and contracting workers typically receive lower wages than wages paid to direct employees of firms. Heidi Shierholz, *Strengthening Labor Standards and Institutions to Promote Wage Growth*, BROOKINGS 9 (Feb. 27, 2018), <https://www.brookings.edu/research/strengthening-labor-standards-and-institutions-to-promote-wage-growth/> [https://perma.cc/ANS7-N9VB].

42. Acevedo, *supra* note 4, at 1119. While statutory employees of nursing homes had access to COVID-19 tests or the vaccine, contractors or temporary workers did not. Justin Feldman, *Coronavirus Is an Occupational Disease that Spreads at Work*, JACOBIN (Jan. 2021), <https://jacobinmag.com/2021/01/COVID-19-business-work-public-health>; Gabrielle Emanuel, *Some Health Care Workers Say They Are ‘Forgotten’ in COVID-19 Vaccination Plans*, NPR (Jan. 5, 2021), <https://www.npr.org/2021/01/05/953510715/some-health-care-workers-say-they-are-forgotten-in-covid-19-vaccination-plans> [https://perma.cc/W3NW-SF67].

43. Peter Eavis, *Meager Rewards for Workers, Exceptionally Rich Pay for C.E.O.s*, N.Y. TIMES (June 11, 2021), <https://www.nytimes.com/2021/06/11/business/ceo-pay-compensation-stock.html> [https://perma.cc/8HW9-GFA2]; David Gelles, *C.E.O. Pay Remains Stratospheric, Even at Companies Battered by Pandemic*, N. Y. TIMES (April 24, 2021), <https://www.nytimes.com/2021/04/24/business/ceos-pandemic-compensation.html> [https://perma.cc/8YHZ-RXP3].

44. Molly Kinder, Laura Stateler & Julia Du, *Windfall Profits and Deadly Risks: How the Biggest*

contrast, the collective wealth of American billionaires increased by fifty-five percent following the initial COVID-19 shutdown.⁴⁵ Indeed, the 2020 pandemic year *alone* accounted for one-third of billionaire wealth growth over the last thirty-one years.⁴⁶

V

PROTECTING ESSENTIAL WORKERS IN THE NEXT PANDEMIC

Just before the pandemic, economists suggested that the best way to prepare for an economic downturn is to anticipate that it will occur then develop automatic financial triggers.⁴⁷ There will be another health pandemic, and though the COVID-19 pandemic has now entered its third year, businesses that likely will be declared essential in that future pandemic have done little to prepare for it. Moreover, the government has not considered how to balance the economic risks of a total business shutdown against the health risks of forcing low wage essential workers to return to potentially unsafe workplaces. Just as the country should plan and prepare to implement certain financial actions during economic downturns, we should plan and prepare to implement certain safety measures to keep essential workers safe during the next pandemic.

A. Adopting a PEW Plan

Regulatory guidance was unclear and advisory when the COVID-19 essentiality declarations were ordered. In addition, antiquated and siloed public

Retail Companies Are Compensating Essential Workers During the COVID-19 Pandemic, BROOKINGS (Nov. 2020), <https://www.brookings.edu/essay/windfall-profits-and-deadly-risks/> [<https://perma.cc/8NHP-YA52>]. Even with these increases, average hourly wages of \$11–\$12 were below a living wage and below the poverty line for a family of four.

45. Chuck Collins, *Updates: Billionaire Wealth, U.S. Job Losses and Pandemic Profiteers*, INEQUALITY (Oct 18, 2021), <https://inequality.org/great-divide/updates-billionaire-pandemic/> [<https://perma.cc/8T9V-YWB6>].

46. *Id.*

47. Proposed economic relief include automatically increasing Medicaid funding, sending stimulus checks when the unemployment rate rises above a certain level, or paying cash subsidies like food stamps. See Claudia Sahn, *Direct Stimulus Payments to Individuals*, in RECESSION READY: FISCAL POLICIES TO STABILIZE THE AMERICAN ECONOMY 67 (Heather Boushey, Ryan Nunn, and Jay Shambaugh eds., 2019), https://www.hamiltonproject.org/assets/files/AutomaticStabilizers_FullBook_web_20190508.pdf [<https://perma.cc/5AL4-2VYF>] (proposing direct stimulus payments when national unemployment rises by 0.5 percent); Matthew Fiedler, Jason Furman & Wilson Powell III, *Increasing Federal Support for State Medicaid and CHIP Programs in Response to Economic Downturns*, BROOKINGS 93 (May 16, 2019), <https://www.brookings.edu/research/increasing-federal-support-for-state-medicaid-and-chip-programs-in-response-to-economic-downturns/> [<https://perma.cc/BT42-GA2L>] (proposing automatic increase in federal expenditure on Medicaid and CHIP when state unemployment reaches certain level); Indivar Dutta-Gupta, *Improving TANF's Countercyclical through Increased Basic Assistance and Subsidized Jobs*, BROOKINGS 181 (May 16, 2019), <https://www.brookings.edu/research/improving-tanfs-countercyclical-through-increased-basic-assistance-and-subsidized-jobs/> [<https://perma.cc/2MLT-VGVA>] (proposing creation of TANF community fund as an automatic economic stabilizer); Hilary Hoynes & Diane Whitmore Schanzenbach, *Strengthening SNAP as an Automatic Stabilizer*, BROOKINGS 217 (May 16, 2019), <https://www.brookings.edu/research/strengthening-snap-as-an-automatic-stabilizer/> [<https://perma.cc/8C22-PDUJ>] (proposing 15 percent increase in SNAP benefits during recessions).

health systems made it hard for businesses to decide which workplace changes they needed to make to protect their workers. Moreover, the overall uncertainty created by unclear regulatory guidance and a paucity of verified scientific information during the early weeks of the pandemic made it hard for businesses to negotiate with individual workers or with bargaining units to determine which workplace safety procedures would best protect workers.⁴⁸ Statutory laws, principally the Occupational Safety and Health Act of 1970 and the Employee Retirement Income Security Act of 1974, largely dictate workforce safety standards though businesses can choose to make their workplaces safer than the statutes demand. Businesses that chose to ignore advisory guidance faced few consequences, however, as noted in a February 2021 report by the Inspector General for the Department of Labor:

Compared to a similar period in 2019, OSHA received 15 percent more complaints in 2020, but performed 50 percent fewer inspections. As a result, there is an increased risk that OSHA is not providing the level of protection that workers need at various job sites. During the pandemic, OSHA issued 295 violations for 176 COVID-19 related inspections, while 1,679 violations were issued under State Plans.⁴⁹

In anticipation of the next health pandemic, state and federal health and labor agencies should prepare default PEW regulations that protect *all* essential workers (whether classified as employees, temporary, contract, or gig workers and whether U.S. citizens, undocumented, unionized, or at-will) from being forced to choose between being safe or being paid. PEW regulations should be clear, uniform, and mandatory and should specify when businesses declared essential must implement those rules or rules that they develop after negotiating with a worker bargaining unit. Several federal and state entities have already prepared advisory guidance or workforce safety rules that could be used to develop PEW regulations.

CISA prepared advisory guidance in August 2020 that urged organizations to “implement their business continuity and pandemic plans or put plans in place if they do not exist,” stressing that “[d]elaying implementation is not advised and puts at risk the viability of the business and the health and safety of the

48. The limitations of relying on *ex post* remedies to protect workers is best exemplified by the struggles unions and businesses faced when they tried to negotiate over workforce safety measures and in insurance disputes concerning COVID-related business interruptions. Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 *YALE L.J.* 87, 89–90 (1989).

49. U.S. DEPT. OF LAB., OFF. OF INSPECTOR GEN. AUDIT, REP. NO. 19-21-003-10-105, COVID-19: INCREASED WORKSITE COMPLAINTS AND REDUCED OSHA INSPECTIONS LEAVE U.S. WORKERS’ SAFETY AT INCREASED RISK (2021).

employees.”⁵⁰ Likewise, a few states, including Oregon⁵¹ and New York⁵² have already enacted workplace safety rules that federal and state agencies could use as a model for PEW regulations.⁵³ The Biden Administration has also developed “best practices” employers could implement to make their workplaces safer. These practices include conducting hazard assessments, ensuring infected or potentially infected workers are segregated and sent home, and protecting workers who raise health or safety concerns. The Biden Administration also has provided guidance that urged employers to engage their workers (or their workers’ union) in developing and implementing a COVID-19 Prevention Program.⁵⁴ Additionally, the Biden Administration has issued recommendations and standards that are designed to transform the country’s ability to prepare for and respond rapidly and effectively to a future pandemic.⁵⁵

While PEW regulations primarily should be designed to protect workers, it is in the best interest of essential businesses to develop health and safety standards they can quickly implement. Just as many large businesses welcomed the Biden Administration’s vaccine mandates because those mandates gave businesses cover from workers who did not want to be vaccinated,⁵⁶ implementing a PEW plan that is based on state or federal guidance allows businesses to avoid the guesswork that inevitably takes place during the early stages of a pandemic. Requiring businesses to have a plan would also help ensure that businesses who voluntarily implement workplace safety measures are not placed at a competitive disadvantage relative to businesses who choose corporate profits over worker safety. Protecting workers also helps business productivity as research shows that

50. *Guidance on the Essential Critical Infrastructure Workforce: Ensuring Community and National Resilience in COVID-19 Response*, CYBER & INFRASTRUCTURE SEC. AGENCY (March 28, 2020), https://www.cisa.gov/sites/default/files/publications/CISA_Guidance_on_the_Essential_Critical_Infrastructure_Workforce_Version_2.0_1.pdf [<https://perma.cc/NPP2-7QDJ>].

51. Oregon’s OSHA adopted “Rules Addressing the COVID-19 Public Health Emergency in All Oregon Workplaces” that apply starting May 2021, more than a year after the pandemic started but before rates increased because of the delta variant. *Oregon OSHA’s Adoption of Rules Addressing the COVID-19 Public Health Emergency in All Oregon Workplaces*, Or. Dep’t of Consumer Bus. Servs. (May 4, 2021), <https://osha.oregon.gov/OSHARules/adopted/2021/ao2-2021-letter-cov19-allworkplaces.pdf> [<https://perma.cc/C2ET-EBFB>].

52. S. 1034-B, 2021–2022 Legis., Reg. Sess. (N.Y. 2021).

53. Entities and employees are more inclined to comply with and stick to default rules that reflect best practices. Cass R. Sunstein, *Switching the Default Rule*, 77 N.Y.U. L. Rev. 106, 177 (2002).

54. *Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace*, OCCUPATIONAL SAFETY AND HEALTH ADMIN. (June 10, 2021), <https://www.osha.gov/coronavirus/safework> [<https://perma.cc/3844-9EUG>]; BIDEN-HARRIS ADMIN., AMERICAN PANDEMIC PREPAREDNESS: TRANSFORMING OUR CAPABILITIES (Sept. 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/09/American-Pandemic-Preparedness-Transforming-Our-Capabilities-Final-For-Web.pdf> [<https://perma.cc/4Y7C-VUAE>].

55. See generally BIDEN-HARRIS ADMIN., *supra* note 54 (presenting a strategy to improve national biodefense and pandemic response capabilities).

56. See David Goldman, *Here’s Who Loves Biden’s Vaccine Mandate: The Companies that Have to Enforce It*, CNN BUS. (Sep. 10, 2021), <https://www.cnn.com/2021/09/10/business/biden-vaccine-mandate/index.html> [<https://perma.cc/3XEU-BYLA>] (explaining that big businesses supported vaccine mandates since it would clarify rules, reduce the chance of work stoppages, and prevent businesses who require vaccination from losing employees to rivals).

workers who trust their managers or employers and feel they are treated with respect at work have been shown to be more motivated to work harder and perform better.⁵⁷

Essential businesses that prefer to develop their own PEW plans rather than adopt default PEW regulations should be allowed to do so if they develop the plan after engaging their workers or a bargaining unit.⁵⁸ Because most workers do not have employment contracts and are not employed in unionized workforces, non-unionized essential businesses should be required to engage in an alternative form of bargaining and negotiate with a centralized multi-employer or industry-wide bargaining unit.⁵⁹ Given the structural inequalities embedded in occupationally segregated workplaces, it is critical that low wage essential workers be represented by a labor organization. It is unrealistic to expect that they can effectively negotiate with large businesses, just as it currently is virtually impossible for at-will and contracted workers to negotiate with businesses.⁶⁰

Mandating that workers join unions and requiring businesses to pay union fees ostensibly conflicts with the worker's freedom of contract and with at-will and temporary contracting employment arrangements. Given what we witnessed during this pandemic, though, sectoral bargaining can protect non-unionized workers while also allowing private businesses to better determine the most suitable types of workplace health and safety procedures they should implement during a pandemic.⁶¹ Because appropriate workforce safety measures may vary dramatically depending on the nature of the business, requiring businesses to

57. See Joanna Gaitens, Marian Condon, Eseosa Fernandes & Melissa McDiarmid, *COVID-19 and Essential Workers: A Narrative Review of Health Outcomes and Moral Injury*, 18 INT. J. ENV'T. RSCH. & PUB. HEALTH, no. 4, 2021, at 13.

58. The New York regulations require its agencies to create safety rules that businesses with 10 or more employees must adopt, unless the businesses implement a comparable safety plan. It also requires employers to permit the creation of a workplace health and safety committee, jointly staffed by employers and employees, charged with evaluating whether the safety protocols are effective. S. 1034-B, 2021–2022 Legis., Reg. Sess. (N.Y. 2021).

59. See Michael M. Oswalt, *Alt-Bargaining*, 82 LAW & CONTEMP. PROBS., no. 3, 2019, at 89, 96 (discussing the rise of alternative-labor, where unions and non-profits mobilize workers through means other than collective bargaining). The widely publicized “Fight for \$15” movement to increase the minimum wage to a living wage and *ad hoc* groups of union and non-union teachers who went on unauthorized strikes in southern states in 2018 are examples of alt-bargaining. *Id.* at 112–22.

60. McNicholas et al., *supra* note 18.

61. Essential workers in “right to work” states cannot be forced to join a union and union organizing in this country is based on an “enterprise-based” bargaining model where individual businesses bargain with a local union. Jeanne Mirer, *Right-to-Work Laws: History and Fightback*, 70 NAT'L L. GUILD REV. 30, 32 (2013). Union advocates criticize this model, arguing that enterprise-level bargaining encourages businesses to defeat unionization attempts (including by using illegal means) because of their belief that having a unionized workforce increases their labor costs relative to their non-unionized competitors. See Lynn Rhinehart & Celine McNicholas, *Collective Bargaining Beyond the Worksite: How Workers and Their Unions Build Power and Set Standards for Their Industries*, ECON. POL'Y INST. 3 (May 4, 2020), <https://files.epi.org/pdf/193649.pdf> [<https://perma.cc/4KQM-CV52>] (discussing how current labor law obstructs unions from taking multi-employer approaches to bargaining). Sectoral bargaining is not the norm in the United States but is widely used in Sweden, Denmark and France. Rogers, *supra* note 41, at 5–7.

engage in industry or regionally based bargaining would be the most efficient way to ensure that businesses enact uniform health and safety measures that can adapt to potentially changing guidance issued by the CDC or other health agencies.

B. The Positive And Negative Consequences of Adopting a PEW Plan

To encourage essential businesses to implement PEW plan and to reward them for adopting a plan, workers at businesses with PEW plans should not be allowed to picket, strike, boycott, or engage in work slowdowns during a pandemic unless the workers are unionized and engaged in contract negotiations. In addition, workers who object to safety procedures contained in a PEW plan should be required to resolve any dispute about the plan in binding arbitration even if the worker has the right to sue under applicable law. To ensure that businesses are not penalized if agency guidance changes (as repeatedly occurred during COVID-19) in ways that make their original PEW plan inadequate, workers also should not be allowed to engage in workforce stoppages for pandemic-related health concerns caused by changing guidance as long as businesses modify their current plan within a reasonable period.

Essential businesses that enact a PEW plan also should be immune from liability in suits filed by workers who contract the pandemic disease at work. The Trump Administration believed that its DPA Order protected essential businesses from liability in lawsuits filed by workers who returned to unsafe workplaces and contracted COVID-19. The text of the DPA, however, appears to provide immunity only if the DPA order causes the essential business to breach a contract with a third-party.⁶² Whether an essential business is complying with a DPA order or a state or federal essentiality order, businesses that adopt a PEW plan should be shielded from liability for tort-based or breach of contract pandemic-related health claims filed by workers.

No business, whether or not it has enacted a PEW plan, should be allowed to retaliate against workers who contract the disease at work, who miss work because they became infected by the virus, or who raise concerns about workplace safety conditions to the media, a union, or state or federal regulators.⁶³

62. Exec. Order. No. 13917, 85 Fed. Reg. 26313 (Apr. 28, 2020). The Trump Administration indicated that the federal government would “consider” requests by meat production plants to intervene on the employer’s behalf if they were sued by workers or others and also indicated the Administration would consider intervening in lawsuits employees filed against employers who failed to take “steps in good faith to follow” voluntary health and safety guidelines. McGarity et al., *supra* note 12, at 17–18.

63. Preventing businesses from firing essential F2F workers who raise concerns about workplace safety is consistent with the tort of wrongful discharge in violation of public policy, which is designed to encourage workers to behave in ways that protect public interests. *See generally* RESTATEMENT (THIRD) OF EMP. L. §§ 5.01–03 (AM. L. INST. 2015) [hereinafter RESTATEMENT]; *see also* David A. Hoffman & Cathy Hwang, *The Social Cost of Contract*, 121 COLUM. L. REV. 979, 997–98 (2021) (urging courts to stand in for the public and reform “contracts that, if performed, would produce outsized public burden” if “the public’s burden changes materially and unexpectedly” between the contract’s signing and its performance); *see also* Matthew T. Bodie, *The Best Way Out is Always Through: Changing the Employment-at-Will Default Result to Protect Personal Autonomy*, 2017 U. ILL. L. REV. 223, 250–51, 259–60 (2017) (discussing the tort of wrongful discharge in violation of public policy and its application).

Although businesses that enact a PEW plan should be immune from liability in suits filed by workers who were exposed to the pandemic illness at work, businesses that do *not* implement a PEW plan should be liable in lawsuits for *all* pandemic-related workforce injuries. Moreover, workers should be allowed to sue businesses that refuse to enact a PEW plan for breach of the duty of good faith and fair dealing and breach of the duty to provide safe conditions and any purported waivers or tort defenses (like the assumption of risk) that might shield businesses from liability should be rejected and deemed void as to public policy.⁶⁴ Similarly, economic losses suffered by workers who become infected while working for an essential business that does not enact a PEW plan should be treated as employment-related injuries that are compensable under applicable workers' compensation laws.⁶⁵

Businesses that do not adopt a PEW plan also should be prevented from taking *any* disciplinary action, particularly terminations, against workers except for good cause shown. These businesses should also not be allowed to compel workers to engage in mandatory arbitration for any workplace dispute, whether related to the pandemic or not. Preventing businesses from making adverse employment decisions about essential workers would make it harder for them to retaliate against essential workers who (1) resist returning to work because of safety concerns, (2) inquire about workplace infection or mortality rates, or (3) raise safety concerns at work, on social media, or with others outside of work.

Finally, essential businesses that do not adopt a PEW plan should be required to give their workers hazard pay until their workplaces return to pre-pandemic safety levels.⁶⁶ Mandating hazard pay for jobs that became unsafe *because of* an essentiality declaration is consistent with existing risk-based compensation levels for workers with inherently dangerous jobs or workers who are asked to perform dangerous tasks at existing jobs. For example, private workers who accept jobs known to be hazardous, like miners, police officers, and some construction trades, generally receive above market pay or enhanced benefits to compensate them for these workplace risks.⁶⁷ Similarly, federal workers are entitled to higher

64. Brudney, *supra* note 19, at 19–20 & nn.82–83 (discussing lawsuits workers filed to compel employers to take workplace safety precautions); RESTATEMENT, *supra* note 63, § 4.05.

65. See Creola Johnson, *Crushed by COVID-19 Medical Bills, Coronavirus Victims Need Debt Relief Under the Bankruptcy Code and Workers' Compensation Laws*, 125 PENN ST. L. REV. 453, 494 (2021) (noting that “COVID-19-infected workers in many U.S jurisdictions may not be covered by workers' comp laws”).

66. Hazard pay could derive from pandemic premiums proposed in COVID-19 legislation for frontline essential workers, the federal overtime wage, or an enhanced minimum wage, or could be indexed to the firm's stock price increase. For example, the hazard pay bonus could be 10 percent of the increase in a firm's stock price such that essential workers at firms whose stock price increases fifty percent would receive a five percent pay increase. SENATE DEMOCRATS, THE COVID-19 “HEROES FUND”: SENATE DEMOCRATS' PROPOSAL FOR PANDEMIC PREMIUM PAY TO REWARD, RETAIN & RECRUIT ESSENTIAL WORKERS (2020), <https://www.democrats.senate.gov/imo/media/doc/Heroes%20Fund%20FINAL%204.7.20.pdf> [<https://perma.cc/WXS9-WTKF>]; H.R. 8349.

67. Jason R. Bent, *OSHA, The Opportunism Police*, 2019 BYU L. REV. 365, 394 (2019) (“Workers and employers freely enter into employment contracts where workers exchange their labor and their time

pay if their duties include “unusual physical hardship or hazard”⁶⁸ and military personnel are eligible for hazardous duty pay if they perform hazardous duties like parachute jumping, demolition of explosives, or handling toxic fuels, or are sent to work in warzones.⁶⁹

C. Excess Profits Tax

Essentiality declarations gave some businesses significant competitive advantages over other businesses and resulted in enormous corporate profits and soaring stock prices for many large essential businesses.⁷⁰ Because of essentiality declarations, customers’ buying patterns shifted in favor of businesses deemed essential, like grocery stores, and large businesses whose services were in greater demand because of the essentiality declaration, like Amazon. Customers shied away from non-essential businesses or businesses in less demand during the pandemic, like restaurants and bars.⁷¹ To level the playing field for smaller and non-essential businesses, to close racial health equity gaps, and to raise revenue to hire more public health and safety inspectors, the federal government should impose an excess profits tax during the next pandemic.

In the past, the U.S. government has used revenues generated from an excess profits tax to subsidize war efforts, to curb corporate profiteering, and to respond to the optic of large businesses earning excessive profits while young Americans were risking their lives and health to preserve the country.⁷² Although legislative efforts to enact a similar tax failed during the COVID-19 pandemic,⁷³ a pandemic

for wages and benefits. Express or implicit in these contracts is an acknowledgement that workers are agreeing to expose themselves to certain risks of the job. Workers receive compensating wage differentials in return for taking on risk.”)

68. 5 C.F.R. § 550.901 (2022); 5 C.F.R. § 550.903(b) (2022); 5 C.F.R. § 550.904(a) (2022).

69. See *Special and Incentive Pays*, DEF. FIN. & ACCT. SERV., <https://www.dfas.mil/militarymembers/payentitlements/specialpay/> [<https://perma.cc/669G-M9JG>] (providing information on hardship and hazardous duty pay for military members).

70. Some firms reaped enormous benefits from the pandemic. Amazon’s profits rose seventy percent and Walmart’s increased forty-five percent. Their stock prices also soared (Amazon (sixty-five percent) and Walmart (forty-one percent)). Kinder et al., *supra* note 44.

71. Americans consumed more food at home and spent twenty-eight percent less on food away from home during the early months of the pandemic because grocery stores (but not restaurants and bars) were deemed essential. Jeff Luckstead, Rodolfo M. Nayga, Jr. & Heather A. Snell, *Labor Issues in the Food Supply Chain Amid the COVID-19 Pandemic*, 43 APPLIED ECON. PERSP. & POL’Y 382, 383 (2021).

72. Jeffries, *supra* note 8, at 12; see Buehler, *The Taxation of Corporate Excess Profits in Peace and War Times*, 7 LAW & CONTEMP. PROBS., no. 2, 2019, at 291, 294 (“During the crisis when man power was conscripted for the war it was quite universally agreed that capital would also be drafted and profiteering should be limited by price controls and by taxation.”). See generally MALCOLM H. BRYAN, THE FEDERAL REVENUE SYSTEM: THE EXCESS PROFITS TAX (1934), <http://www.taxhistory.org/Civilization/Documents/Surveys/hst23741/23741-1.htm> [<https://perma.cc/QYU2-ZZW7>] (discussing historical examples of excess profit taxes).

73. Former Rep. Tulsi Gabbard submitted a resolution (that did not pass) in December 2020 that would “reinstate the wartime excess profits tax” on big box retailers, high tech businesses and other large corporations who achieved massive profits during the pandemic. Corporations that earned excess profits (calculated by using average gross earnings from 2016–2019 minus the average total 2020 gross earnings) would be taxed at a rate of ninety-five percent on the excess profits to fund economic relief to small businesses in this proposal. H.R. Res. 1267, 116th Cong. (2020).

excess profits tax would accomplish several goals.

Taxing essential businesses and using pandemic profits could decrease the competitive advantages essentiality declarations gave large essential businesses relative to smaller and non-essential businesses.⁷⁴ In addition, tax revenues could help defray the costs of PPE for smaller and non-essential workplaces and funds could also be used to create temporary and affordable childcare facilities to help essential F2F workers with children avoid having to choose between earning income and taking care of their children.⁷⁵ Revenues should also be used to close racial health equity gaps and fund proposals like the ones proposed by the Biden COVID-19 Health Equity Task Force, including financially supporting organizations that work with communities of color and other underserved populations to help them participate in pandemic and public health emergency preparedness, response, and recovery activities. Likewise, revenues from an excess profits tax can be used to create a multi-pronged education, outreach, and communications campaign to target BIPOC communities and to partner with unions and worker organizations that represent low wage F2F essential workers to improve their access to health care services.⁷⁶

Finally, revenues should be used to hire more workers to inspect workplaces and respond to worker's complaints about unsafe workplaces. A recent Bipartisan Policy Center report stresses the need to "consider a broader public health modernization effort to determine the vision, strategy, and implementation of a public health system for the 21st century" that includes "intergovernmental coordination and federal oversight."⁷⁷ The Trump Administration's incompetence is mostly to blame for (1) ordering businesses to remain open or reopen, (2) failing to provide clear guidance about what businesses needed to do to protect their workers and (3) refusing to use the DPA to increase the supply of PPE and COVID-19 tests businesses could give their workers. Even a competent administration likely would have struggled to keep essential workers safe, however, because of chronically underfunded and understaffed public health systems that have been shrinking for decades.

74. See *id.* (observing that Amazon, Facebook, Walmart and Zoom had enormous competitive advantages over smaller businesses and that they may have engaged in profiteering and opportunistically enriched themselves because of the competitive advantages the essential declaration gave them).

75. See William M. Tuttle, Jr., *The American Family on the Home Front, in WORLD WAR II AND THE AMERICAN HOME FRONT* 50, 63–67 (Nat'l Historical Landmarks Program ed., 2007), https://www.nps.gov/subjects/nationalhistoricalandmarks/upload/WWII_and_the_American_Home_Front-508.pdf [<https://perma.cc/2LQR-E44U>] (discussing World War II childcare facilities that helped women join the paid labor market and perform jobs that male workers could not because they were fighting in the war).

76. *The Presidential COVID-19 Health Equity Task Force*, OFFICE OF MINORITY HEALTH, <https://www.minorityhealth.hhs.gov/omh/browse.aspx?lvl=2&lvlid=100> [<https://perma.cc/93BS-8S8V>].

77. BIPARTISAN POL'Y CTR., POSITIONING AMERICA'S PUBLIC HEALTH SYSTEM FOR THE NEXT PANDEMIC 12–13 (2021), https://bipartisanpolicy.org/download/?file=/wp-content/uploads/2021/06/Public-Health-Report_RV2.pdf [<https://perma.cc/TE3L-W3ZX>]. See also AFL-CIO, *supra* note 24, at 26 (detailing OSHA inspector staffing shortages and reduced workplace inspections).

The COVID-19 pandemic, while cataclysmic, was not unexpected as public health experts have warned of a pandemic like this for at least a decade.⁷⁸ The almost complete inability to coordinate a public health response at the national and state level during the initial weeks of the pandemic made it virtually impossible to slow the spread of the virus. Decades of cutbacks to public health budgets made it harder for states and localities to determine if particular occupations (like correctional staff), industries (like meatpacking plants), or communities (like BIPOC and lower income) have higher infection or mortality rates. Likewise, because cuts to OSHA and state occupational health agencies reduced the number of inspectors, it was harder to identify then inspect workplaces with high infection rates, to conduct robust contract tracing, or to investigate whistleblower complaints about unsafe workplaces and assess penalties for essential businesses that failed to protect their workers.⁷⁹

Revenues from an excess profits tax could be used to expand public health systems to ensure they can quickly and comprehensively collect and share infection and mortality data by income, race, and gender and by individual local workplaces. Additional funding would also ensure states and the federal government could gather data that would make it easier for state or local safety inspectors to determine which worksites to visit to help control the spread of the virus. Lastly, enhanced spending on public health would allow states and localities to better prioritize where to place testing or vaccine sites and who to prioritize for vaccine distribution.⁸⁰

VI

CONCLUSION

Essential workers protected us, but no one really seemed to want to protect them. They were never fairly compensated for performing tasks that kept the economy going and made it possible for people to safely WFH. Essential workers basically were told to decide whether they wanted to be safe or be paid. In the

78. Leslie E. Gerwin, *Planning for Pandemic: A New Model for Governing Public Health Emergencies*, 37 AM. J. L. & MED. 128, 128–29 (2011).

79. OSHA only cited 346 employers for COVID-19 violations in 2020, the average penalty was only \$3,751, and the number of OSHA inspectors was almost at a fifty-year low. AFL-CIO, *supra* note 12, at 2–3. OSHA is tasked with protecting private sector workers from safety and health risks and enforces workplace safety in about half of the states. OSHA-affiliated state agencies, overseen by state governors and OSHA, enforce workplace safety duties in the remaining states. OSHA threatened to strip three states (Arizona, South Carolina and Utah) of their authority to regulate workplace safety because of those agencies' refusal to mandate sufficient coronavirus protections. Noam Scheiber, *OSHA, Citing Covid Failures, Moves to Strip Three States of Workplace Safety Authority*, N.Y. TIMES (Oct. 19, 2021), <https://www.nytimes.com/2021/10/19/business/economy/osha-covid-workplace-safety-states.html> [<https://perma.cc/LVF4-TBBA>].

80. The Biden Administration recently prepared a pandemic preparedness plan that noted the need to modernize public health infrastructure, increase and diversify the public health work force, invest in public health digital infrastructure, and prioritize the allocation of public health resources in vulnerable communities. BIDEN-HARRIS ADMIN., *supra* note 54, at 13.

next pandemic, private businesses that benefit from being declared essential must have a duty to ensure that their workers can do their jobs without putting their health and lives at risk.