

Workers Need Federal Protection From COVID-19 Risks

By **Peter Whelan and Elizabeth Paukstis** (April 29, 2020)

As the COVID-19 pandemic continues to kill more than 1,000 Americans each day, some state governments are moving to allow employers to force employees in certain industries back into the workplace.

South Carolina Gov. Henry McMaster allowed certain retail shops to reopen, and permitted residents to visit public beaches.[1] Businesses in Alabama, Tennessee and Ohio — where a state prison recently became the largest source of coronavirus infections in the country — are slated to reopen on May 1.[2]

In Georgia, Gov. Brian Kemp gave many businesses the green light to reopen, including hair salons and tattoo parlors.[3] Kemp urged employers to comply with social distancing orders, but failed to explain how compliance could be possible under the circumstances. Employees in such workplaces cannot perform their jobs, of course, without physically touching customers.

Some states are clearly eager to reopen nonessential workplaces, but appear less enthusiastic about installing safeguards to protect the people working in them. For example, Georgia's State Board of Cosmetology and Barbers offered optional guidance, but placed the onus for containing the virus squarely on the shoulders of employees, requiring that workers must wear masks at all times, while employers "may want to consider providing masks to clients." [4] Meanwhile, customers "should wear face masks to the extent possible while receiving services."

As states allow employers to require nonessential employees to return to the workplace, will they also force employers to ensure safe working conditions? Or will employees have no choice but to risk their lives to service customers who may spread the coronavirus even when they are asymptomatic?

In the Absence of Enforcement, Employees Struggle for Protections

As the coronavirus has surged through the country, many employees have looked to the courts to force their employers to safeguard employee health and safety. Unions representing employees deemed essential have filed lawsuits seeking injunctive relief that would require employers to provide personal protective equipment and implement safety measures.

On April 17, the union representing bus drivers in Miami-Dade County, Transportation Workers Union of America, Local 291, sued the director of the Florida Department of Transportation and Public Works, alleging that the county failed to provide transit workers with sufficient personal protective equipment and cleaning products, despite an adequate supply.[5]

The plaintiffs reported that in some cases, the department distributed a single disinfectant wipe to last a driver's entire shift and "issued bus drivers a single surgical mask, which operators were told to reuse," instead of the Centers for Disease Control and Prevention-



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recommended N95 and/or KN95 masks.[6] Meanwhile, the department has cut bus routes and service, causing overcrowding that renders social distancing impossible.[7]

The complaint cited reports that COVID-19 has killed New York City's transit workers "at three times the combined rate of the city's police and fire departments." [8] Absent injunctive relief, the plaintiffs allege, transit workers, "their families, the passengers, and the community at large could suffer physical injury, illness, and potentially death" from COVID-19.[9]

On April 20, the New York State Nurses Association, or NYSNA, filed for injunctive relief against two hospital systems and the New York Department of Health. In its suit against Montefiore Health System Inc., the NYSNA pointed out that more than 950 NYSNA nurses, at least 150 of them at Montefiore, had already tested positive for COVID-19.[10]

The NYSNA alleged that the hospital required nurses who suffered from COVID-19 symptoms to use their own sick time and return to work after only seven days, regardless of whether their symptoms had subsided.[11] The complaint described scenarios in which nurses were forced to treat numerous sick patients without fluid-resistant gowns, face shields, goggles or N95 respirators, despite their availability "in a locked closet in the clinic." [12]

Additionally, the NYSNA's lawsuit against Westchester City Health Care Corp. alleged that the employer's "consistent practice has been to provide its RNs with a single N-95 to use for the week." [13]

And the New York State Department of Health, the union contended, had created a public nuisance, in part by defying Gov. Andrew Cuomo's directive ordering hospitals to distribute a respiratory mask to each nurse on a daily basis.[14] According to the NYSNA's complaint, New York's hospitals have become petri dishes where the virus spreads easily because nurses must work while sick, denying their repeated requests for tests, and to reuse their uncleaned, ill-fitting masks and gowns.[15]

At Amazon.com Inc., which has made billions in revenue during the pandemic delivering everything from groceries to Legos and athletic socks, warehouse workers have organized strikes because of the company's refusal to distribute face masks or grant paid sick leave.[16] In response, Amazon has fired employees who protested working conditions in Amazon warehouses.[17]

Most individual, nonessential workers — who tend to be nonunionized and unorganized — lack the same resources to file lawsuits or stage mass protests. These employees must rely on the Occupational Safety and Health Administration to enforce health and safety standards in the workplace.

Although OSHA recently issued unenforceable recommendations for employers about how to ensure safety in the workplace during the pandemic, OSHA makes clear that the recommendations do not impose any new legal obligations on employers, so employers can ignore them without consequence.[18]

OSHA's refusal to require employers to follow COVID-19 guidance issued by the CDC is particularly troubling when contrasted with its enforcement of CDC guidance regarding health care workers during the H1N1 flu outbreak in 2009.[19] Although it most recently announced its intent to inspect health care facilities during the pandemic, OSHA has stated that all other workplaces with alleged hazards should expect the same nonformal

procedures.[20]

Meanwhile, thousands of COVID-19 complaints have flooded OSHA's field offices. In Oregon alone, the local field office had received more than 2,000 complaints by early April, but had not issued a single citation.[21]

Enter the EEOC

The U.S. Equal Employment Opportunity Commission recently released return-to-work guidance.[22] Because the EEOC does not enforce statutes related to workplace safety, the guidance offers no significant protections for workers concerned about the health risks of returning to work during a pandemic.

The EEOC's guidance focuses firmly on the rights of employers, leaving multiple questions about employees' rights unanswered. Under the guidance, employers may continue to require medical documentation for employees' reasonable accommodation requests.[23] But the guidance fails to consider the difficulties employees may encounter if they experience COVID-19 symptoms yet cannot get tested, given the widespread unavailability of tests.

The EEOC guidance also gives employers leeway to deny reasonable accommodation requests if they impose an undue hardship (i.e., significant difficulty or expense) on the business. Employers may consider whether the accommodation would affect the company's income stream and whether the company's amount of discretionary funding would be too limited to allow the accommodation. Thus, despite the unprecedented nature of this pandemic, the employer may opt to prioritize the maximization of its profits over employees' health and the critical need to contain the spread of the virus.

Employers may screen employees themselves, according to the guidance, by "continuing to take temperatures and asking questions about symptoms," and they may require employees to wear personal protective equipment, engage in frequent hand-washing and practice social distancing. But crucial questions remain about who will acquire and pay for the personal protective equipment or the hand sanitizer. The employer or the employee?

And will employers guarantee enough space so that social distancing is possible, and allot enough break time so that employees can wash their hands regularly? Workers at Amazon's warehouses alleged that social distancing was impossible given the crowded conditions, and that the company's quotas for churning out packages prevented employees from taking breaks.[24]

The Need for National Protections

Because regulatory authorities like OSHA and the EEOC have thus far failed to act, employees' next best hope for workplace safety protections may be through legislation. Some legislators have already introduced proposals, like the Providing Americans Insured Days of Leave Act, which would mandate additional paid sick leave for employees during the COVID-19 pandemic.[25]

The bill would require the secretary of the U.S. Department of the Treasury to reimburse employers whose workers use the sick time granted under the bill. The COVID-19 Health Care Worker Protection Act would require OSHA to develop an emergency temporary standard to ensure that health care workers are protected from COVID-19.[26]

Most recently, Sen. Elizabeth Warren, D-Mass., and Rep. Ro Khanna, D-Calif., proposed an essential workers bill of rights for inclusion in the next coronavirus relief package.[27] The proposal calls for expanded paid sick leave, robust premium pay, and access to child care for essential workers. The bill would also protect whistleblowers who report unsafe working conditions against retaliation from employers.

Given the pending return of nonessential employees to the workplace, any legislative proposal should extend protections to all workers, not just those deemed essential. Moreover, the key to success will be a strong enforcement mechanism that attaches penalties for any employer who does not comply with its provisions.

Employees should also possess a private right of action to sue employers who violate their rights in the workplace. If optional recommendations were enough to protect employee rights, then Americans would never have needed a Title VII in the Civil Rights Act. To stop the spread of COVID-19 and save the lives of American workers, employer compliance with workplace safety measures cannot be voluntary.

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[5] Complaint for Emergency Injunctive Relief—COVID-19 Pandemic, Transp. Workers Union of Am., Local 291 v. Bravo (11th Cir. Apr. 17, 2020).

[6] *Id.* at ¶¶ 52-53.

[7] *Id.* at ¶ 54.

[8] *Id.* at ¶ 41; Ross Barkan, New York's Transit Workers Keep Getting Sick, The Nation, Apr. 9, 2020, <https://www.thenation.com/article/politics/mta-transit-driver-covid/>.

[9] Id. at ¶ 63.

[10] Complaint for Injunctive Relief, N.Y. State Nurses Ass'n v. Montefiore Med. Ctr., Case No. 1:20-CV-03122-JMF, at ¶ 12 (S.D.N.Y. Apr. 20, 2020).

[11] Id. at ¶ 44.

[12] Id. at ¶ 47.

[13] Verified Complaint, N.Y. State Nurses Ass'n v. Westchester Cty. Health Care Corp., at ¶ 20 (N.Y.S. Apr. 20, 2020).

[14] Memorandum of Law in Support of Temporary Injunction and Temporary Restraining Order, N.Y. State Nurses Ass'n v. N.Y. State Dep't of Health, at *2 (N.Y.S. Apr. 20, 2020).

[15] Id. at *2, 7-13; Hybrid Petition Pursuant to CPLR Article 78, Complaint for Declaratory Judgment, Complaint for Public Nuisance, and Application for Preliminary Injunction, N.Y. State Nurses Ass'n v. N.Y. State Dep't of Health, at ¶¶ 96-97 (N.Y.S. Apr. 20, 2020).

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[21] Editorial Bd., 'You're On Your Own,' Essential Workers Are Being Told, *N.Y. Times*, Apr. 21, 2020, <https://www.nytimes.com/2020/04/20/opinion/osa-coronavirus.html>.

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[23] Id.

[24] 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>; Ginia Bellafante, 'We Didn't Sign Up for This': Amazon Workers on the

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[26] H.R. 6139, 116th Cong. (2020), <https://www.congress.gov/116/bills/hr6139/BILLS-116hr6139ih.pdf>.

[27] Press Release, Office of Sen. Elizabeth Warren, Elizabeth Warren and Ro Khanna Unveil Essential Workers Bill of Rights (Apr. 13, 2020), <https://www.warren.senate.gov/newsroom/press-releases/elizabeth-warren-and-ro-khanna-unveil-essential-workers-bill-of-rights>.