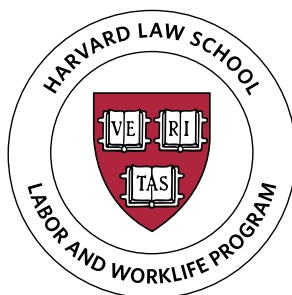


HOW STATES AND LOCALITIES CAN PROTECT WORKPLACE SAFETY AND HEALTH

Jane Flanagan, Terri Gerstein, Patricia Smith



NELP

NATIONAL
EMPLOYMENT
LAW
PROJECT

Overview: What States and Localities Can Do to Protect Workers:

1. Pursuant to existing authority (without new legal requirements)

- Enforce existing state or local laws that require workplace safety (so long as there is no OSHA standard covering the specific workplace hazard of COVID-19);
- File public nuisance lawsuits against employers whose practices endanger public health;
- Enforce public health laws (through state or local public health departments, including in partnership with labor enforcement agencies);
- Use “soft powers” to help improve workplace safety:
 - Help informally mediate to improve conditions in unsafe workplaces;
 - Educate workers, employers, and the general public about applicable laws and measures for workplace safety;
 - Disclose information about employers who are endangering workers and the public, so that customers and others can be aware of this conduct;
 - Convene stakeholders, including employers, workers, or their representatives, to strategize about how to create safe workplaces.
 - Collaborate closely with worker organizations, like unions, worker centers, and others.
- OSHA state-plan states: Actively enforce the state OSH law, especially in high-risk industries. Collaborate with worker organizations and publicize enforcement. Publicize and enforce any state requirements for employer safety plans and employer/employee safety committees.

2. By creating new policies and protections via executive order, rules, or legislation

- Issue and enforce Executive Orders addressing which businesses may legally operate and under what conditions and instituting mandates to protect both workers and members of the public (such as requirements for masks for members of the public and personal protective equipment for workers);
- Enact some or all of the policy proposals included in the National Employment Law Project (NELP) [Policy Brief](#). This brief contains model state or local legislation to create enforceable COVID-19 standards and protect workers. Recommendations include:
 - Adoption of a COVID-19 specific standard (such as California’s Aerosol Transmissible Disease [standard](#)) for health care and emergency response employers in OSHA state-plan states;
 - Adoption of enforceable COVID-19 specific workplace safety requirements for all other employers, including adoption of the CDC and OSHA COVID-19 guidelines;
 - Protection for workers who report or object to unsafe working conditions;
 - Measures enabling greater access to unemployment insurance for workers with safety concerns and to workers’ compensation insurance for essential workers; and
 - Provide a private right of action for workers whose employers have violated these standards, along with causes of action specifically for whistleblowers.
- Implement additional policies to protect workers:
 - Require essential and re-opening businesses to establish employer-employee safety and health committees.
 - Explore government license/permits/contract consequences for employers with persistent unsafe conditions;
 - Require employers to devise and post their plans to protect workers and the public from COVID-19 exposures; and
 - Pass paid sick leave laws filling the gaps in federal coverage.



How States and Localities Can Protect Workplace Safety and Health

Jane Flanagan, Terri Gerstein, Patricia Smith¹

Introduction

As states consider how to protect public health amidst the COVID-19 pandemic, various questions have arisen about their ability to do so: Specifically, to what degree is state action in the health and safety arena preempted by the federal Occupational Safety and Health Act (OSH Act) and federal enforcement by the Occupational Safety and Health Administration of the U.S. Department of Labor (OSHA)? How can states and cities take action to protect workers and members of the public without running into federal preemption issues? This paper provides a basic explanation of OSHA preemption and describes some potential sources of authority and avenues for action by states and localities wishing to protect working people in their jurisdictions.

Part I: The Basics of OSHA Preemption

A. Summary of OSHA Preemption Law

OSHA preemption is limited to a relatively narrow set of circumstances, and states may take action to protect worker safety and health in three primary situations:

1. Where they have become an OSHA-approved “state plan” responsible for all workplace safety and health within the state;
2. Pursuant to state statute or their traditional police powers, so long as there is no OSHA “standard” addressing a particular and specific workplace hazard. Note that “standard” is a term of art within the OSH Act. If there are statutory provisions or regulations but no “standard,” preemption is not a concern; or
3. Where there is an OSHA standard, but the law, regulation, order, or government action protects the general public, and any protection of workers is incidental.

B. OSHA Basics Relevant to this Discussion

The core requirement of the OSH Act is that employers provide workers with safe and healthful working conditions. Among key provisions of the OSH Act relevant to this discussion are:

- The authorization for OSHA to promulgate “standards,”² or rules related to specific identified workplace hazards.”³ OSHA standards fall into several main categories including General Industry, Maritime, Construction, and Agriculture.⁴
- The option for states to become an OSHA-approved “state plan,” and thereby take over responsibility for enforcing workplace safety and health laws so long as their standards are at least as effective as OSHA’s.⁵
- The “general duty clause” of the OSH Act, which requires that each employer furnish to each of its employees a workplace free from recognized hazards that are causing or likely to cause death or serious physical harm.⁶ The general duty clause is not an OSHA standard.
- The prohibition on employer retaliation against workers for exercising their rights under the OSH Act, such as filing a safety or health complaint with OSHA or raising a health and safety concern with their employers.⁷ This prohibition is contained in Section 11c of the OSH Act and is commonly referred to as “Section 11c” or “11c.” It has perhaps the shortest statute of limitations among all federal laws governing the workplace, only 30 days. There are regulations related to 11c, but they are not OSHA standards.

Another key point is that there is no private right of action under the OSH Act. The OSH Act does not prohibit workers’ compensation claims or tort lawsuits with respect to injuries, diseases, or death arising out of, or in the course of, employment, but state workers’ compensation laws do provide that employees covered by workers’ compensation are generally barred from suing their employers under tort law, although some states have exceptions to that bar for intentional torts.

Finally, the OSH Act, like most workplace laws, only protects employees, and not independent contractors; therefore, preemption concerns do not arise in relation to protection of independent contractors.

C. OSHA Preemption Analysis

Twenty one states and Puerto Rico have become OSHA “state plans” for all workplaces, both public and private sector.⁸ OSHA preemption does not apply to these states.⁹

Any analysis of preemption starts with the question of Congressional intent: did Congress intend to displace state and local law?¹⁰ Because preemption of state and local law is generally disfavored there must be clear intent to preempt. The plain language of the OSH Act demonstrates that Congress did not intend to preempt regulation of occupational safety and health entirely.

Section 18(b) of the OSH Act provides that if a state “desires to assume responsibility for development and enforcement ... of occupational safety and health standards” that relate to an issue addressed by an OSHA standard, the state “shall submit” a state plan covering such standards to OSHA. Twenty-one states and Puerto Rico have OSHA approved “state plans,” meaning that in those states they, and not OSHA, are the primary regulators of occupational safety health and can act without raising any preemption concerns.

With regard to all states (state plan and not), Section 18(a) of the OSH Act states that it does not “prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no [federal] standard is in effect.”¹¹ An OSHA standard is distinct from the general statutory duties created by the Act, such as the General Duty clause, which generally requires employers to provide a workplace free of serious recognized hazards.¹² Rather, OSHA standards address a particular occupational safety issue, such as exposure to bloodborne pathogens or required personal fall protection, and are promulgated pursuant to a notice and comment process.¹³

In *Gade v. National Solid Wastes Management Association*, the leading case in this area, a plurality of the Supreme Court held that the “unavoidable implication” of the language of Section 18(a) is that, where there is an OSHA standard in place, a state or city may not develop or enforce its own standards unless it is an approved state plan state.¹⁴ In the converse situation – where there is no specific OSHA standard – courts and OSHA have interpreted this language to reflect clear Congressional intent to safeguard states’ and cities’ traditional common law police powers to protect the public, including by passing their own safety and health standards.¹⁵

Even where there is an OSHA standard in place, specific state or local laws or action may nonetheless avoid preemption when they protect the general public and protection of employees is only incidental. In *Gade*, OSHA had promulgated a standard relating to the training of workers who handle hazardous wastes and Illinois had passed a law regarding training and testing of employees at hazardous work sites.¹⁶ A plurality of the court found that the Illinois statute was preempted because it also regulated the licensing of hazardous waste employees where there was an applicable federal standard and largely impacted occupational health. However, the court in *Gade* acknowledged that laws of “general applicability” intended to protect the general public (including workers) are not preempted if they “cannot fairly be characterized as ‘occupational standards’”:

state laws of general applicability (such as laws regarding traffic safety or fire safety) that do not conflict with OSHA standards and that regulate the conduct of workers and non-workers alike would generally not be pre-empted. Although some laws of general applicability may have a “direct and substantial” effect on worker safety, they cannot fairly be characterized as “occupational” standards, because they regulate workers simply as members of the general public.¹⁷

As such, other preemption challenges to laws more generally intended to protect public health have failed. *Steel Institute of New York v. City of New York* provides perhaps the most helpful recent example: The Second Circuit Court of Appeals upheld New York City’s crane regulations, which were part of the City building code, although OSHA had

adopted a specific crane standard.¹⁸ The Court found that the rules were specifically designed to avoid accident risks posed by cranes, derricks, and other hoisting equipment and the “safety of the general public in the vicinity” of such equipment.¹⁹

D. OSHA Preemption and Applicability to COVID-19

COVID-19 is an airborne infectious disease. OSHA does not have a standard applicable to airborne infectious diseases and has declined to adopt an emergency airborne infectious disease or COVID-specific standard.²⁰ Several forms of guidance have been issued: The Centers for Disease Control (CDC) issued general guidance for businesses and employers;²¹ OSHA issued general and some industry-specific guidance as well;²² and OSHA and the CDC issued joint guidance for meat and poultry processing employers.²³ None of these non-mandatory forms of guidance constitute an OSHA standard.²⁴ As such, there is no OSHA standard that would preempt state and local government from promulgating requirements in this area.²⁵

States and municipalities that consider adopting rules of their own, whether through legislation or executive action, should also review the various OSHA standards that may be relevant, despite not being directly on point.²⁶ However, even if there is a standard, as long as any new law, rule, or action will primarily protect members of the public, it should avoid preemption concerns. Of course, it is extremely difficult to separate protection of workers from protection of the general public in the current crisis as workers who become infected with COVID-19 can be among the primary sources of community spread. Moreover, as states and cities think ahead toward reopening their economies, many of the best practices currently most critical only for essential workers will be important to adopt for the protection of consumers and members of the public.

Part II: How States and Cities Can Adopt Safety Standards and Conduct Enforcement

States and localities can take a variety of actions to protect workers within their jurisdictions without raising OSHA preemption concerns. Some of these steps can be taken simply by using already-existing authority. Others may require new legislation or executive orders. Again, state plans are themselves responsible for promulgation and enforcement of workplace safety and health laws. In addition, states with or without state plans may also take any or all of the following measures.

A. Enforcement and Actions Pursuant to Existing Authority

- 1. Little-used statutes:** In jurisdictions that are not state plans, a careful review of labor and employment statutes may reveal that there are already laws governing workplace safety and health, hiding in plain sight. These laws have likely rarely been utilized since the passage of the OSH Act, but their enforcement would not be preempted by the OSH Act, so long as there is no specific OSHA standard applicable to the conduct that is the subject of the enforcement.

For example, in Maine, an employer “shall furnish to each employee employment and a place of employment that are free from recognized hazards that are causing or are likely to cause death or serious physical harm to the employee.”²⁷ In Rhode Island, “Each employer shall furnish to each of his or her employees a place of

employment which is free from recognized safety and health hazards that are causing or are likely to cause death or serious physical harm to the employees.”²⁸ Numerous other states have similar provisions, including, for example, Massachusetts,²⁹ Missouri,³⁰ New York,³¹ and Wisconsin.³²

In effect, these laws are state-level general duty laws. Within a general duty analysis, employers must keep workplaces free of known hazards causing or likely to cause death or serious physical harm, when a feasible method of correcting the hazard is available. In relation to Covid-19, there are known serious hazards and a feasible method of correction; specifically, following CDC and OSHA guidelines. Thus, employers who fail to follow the CDC guidelines may be violating their state-level general duty obligations.

2. **Public nuisance law:** Public nuisance is a kind of tort liability. The Restatement (Second) of Torts defines it as “an unreasonable interference with a right common to the general public,” and includes among the circumstances that may sustain a public nuisance holding “whether the conduct involves a significant interference with the public health, the public safety, the public comfort or the public convenience.” The evolution of public nuisance jurisprudence under the common law of any particular state may vary, but the basic concept is the same.

As a tort, a public nuisance lawsuit would not be preempted by the OSH Act. Long-standing principle in preemption cases requires courts to “start with the assumption that the historic police powers of the states are not to be superseded by the Federal act unless that was the clear and manifest purpose of Congress.”³³ The OSH Act does not contain any language indicating that Congress meant for the Act or regulations promulgated under it to preempt state tort actions. Rather, the OSH Act specifically states, “[n]othing in this Act shall...enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death arising out of, or in the course of, employment.”³⁴

Public nuisance lawsuits could be used to address unsafe working conditions during the COVID-19 pandemic, because these conditions involve a significant interference with the public health and safety. Already a public nuisance lawsuit has had an impact in the meat processing industry: In April, two public interest law organizations filed suit against Smithfield Foods and Smithfield Fresh Meats,³⁵ based on the risk of community spread of Covid-19 resulting from the companies’ failure to comply with CDC guidelines in their plants.³⁶ The lawsuit sought no money damages, only safer working conditions. While the suit was ultimately dismissed,³⁷ it led to concrete results for workers: Plaintiffs’ attorneys reported that in the week after filing, the plant implemented numerous improved social distancing practices, including fixed barriers between workers, extra opportunities for hand washing, more distance during the clock-in process, and communication to workers that they would not be penalized for taking sick leave.³⁸ Also three days after the case was filed, OSHA and the CDC issued joint guidance for meat packing and processing facilities.³⁹ It should be noted that the *Smithfield* case was dismissed on primary jurisdiction grounds. The court did not question the premise of a public nuisance lawsuit’s applicability to the Covid crisis and the underlying analysis of the order would be largely inapplicable to state or local agencies filing public nuisance lawsuits.

3. **Criminal Law:** State criminal prosecutions of employers for conduct that would also give rise to occupational safety and health violations also have been found not to be preempted. For example, in *People v. Chicago Magnet Wire Corporation*, the state of Illinois criminally prosecuted a corporate employer for significant injuries to 42 workers. The defense argued that such state action was preempted because the conduct at issue governed by OSHA safety standards. However, the court rejected this argument, finding that there was nothing in the OSH Act to indicate Congressional intent to preempt enforcement of State criminal law simply because of its “incidental regulatory effect.”⁴⁰ Indeed, the Court wrote that “prosecutions of employers who violate State criminal law by failing to maintain safe working conditions for their employees will surely further OSHA’s stated goal of ‘assur[ing] so far as possible every working man and woman in the Nation safe and healthful working conditions’...State criminal law can provide valuable and forceful supplement to insure that workers are more adequately protected and that particularly egregious conduct receives appropriate punishment.”⁴¹
4. **Soft Powers:** Finally, nothing in the OSH Act prevents states and localities from using their “soft powers” or bully pulpit to conduct public education and training on COVID-19 and workplace best practices, from bringing together stakeholders regarding the crisis and workplace safety, from helping to negotiate between workers and employers around workplace safety issues, or from communicating with the public about employer conduct that puts workers, and thus members of the general public, at risk.⁴²

B. New Protections via Executive Order, Rules, or Legislation

In addition to using non-preempted, already-existing statutes and authority to conduct enforcement, states and local legislators can pass new laws, or leaders can use executive orders or action, to create new requirements that will protect workers during the pandemic without running afoul of OSHA preemption.

1. Relying on their powers and duties to safeguard public health, Governors across the country have issued Executive Orders addressing, among other things, which businesses may legally operate and under what conditions. Within these orders and given the interrelationship between worker health and public health, there is considerable leeway to create mandates designed to protect both workers and members of the public. For example, in Illinois the Governor’s most recent executive order requires not only that members of the public wear masks when shopping or in areas where social distancing is not possible, but that all workers in essential businesses be provided with face masks to wear while at work.⁴³ The Governor of Michigan also recently issued an executive order requiring employers who continue to operate with in-person staff to provide workers with “protective equipment such as gloves, goggles, face shields, and face masks as appropriate for the activity being performed.”⁴⁴ A willful violation of this provision, as with all other provisions in the Michigan Executive Order, is a misdemeanor offense.⁴⁵ However, enforceability and enforcement of such orders will vary by state depending on the underlying source(s) of authority for the order or emergency rule.
2. The National Employment Law Project (NELP) issued a [Policy Brief](#) that contains model legislation for state and local officials to adopt to create enforceable COVID-19 standards and protect workers from retaliation.⁴⁶ Some proposed provisions could be enacted through executive action, while others might require

legislation. The model bill was written and reviewed by NELP attorneys and others with expertise in OSHA preemption, including former U.S. Department of Labor attorneys, to ensure that preemption concerns will not arise as a result of this proposal. The proposal provides a menu of non-preempted state and local policy options,⁴⁷ as well as an annotation explaining the various provisions, including: specific adoption of the Aerosol Transmissible Disease [standard](#) issued by California's OSHA for health care employers;⁴⁸ workplace safety requirements for all other employers, including adoption of the CDC COVID-19 guidelines; and provisions for whistleblower protection from retaliation and enforcement authority. The model bill also contains unemployment insurance-specific policy measures to enable benefits for workers who separate from employment because of dangerous conditions, as well as making it easier for workers to access workers' compensation insurance eliminate proof hurdles and allowing for a presumption of state workers' compensation coverage for all workers.

The NELP proposal is comprehensive and should be the first and foremost option to be considered by policymakers seeking non-preempted options for protecting workplace safety and health.

3. In addition to the measures in the NELP proposal, a number of other potential measures to protect worker safety and health (that would not raise OSHA preemption concerns) should be considered.

- Mandating wearing of masks in public, or as a lesser alternative, requiring all customers of businesses and patients/visitors to health care facilities to wear masks.
- Requiring essential businesses (and other businesses as they reopen) to establish safety and health committees with labor and management representatives for the purposes of discussing recommendations and workplace rights and protections.⁴⁹
- A prohibition on employers requiring employees to sign non-disclosure agreements (NDAs) that would prevent employees from disclosing workplace safety and health conditions or concerns. While, if challenged, such agreements would likely be held void as against public policy, workers may not realize this or lack access to legal counsel, and thus fear speaking out if they or their colleagues are at risk.
- Provisions specifying that for purposes of government contracting, as well as government-issued licenses and permits, companies must attest to and provide evidence of compliance with the CDC guidelines for COVID-19 and that continued compliance is a material term of any government contract; also legislation explicitly providing that failure to attest to and provide evidence of such compliance is valid ground for suspension or denial of government-issued licenses or permits.
- OSHA is not requiring most non-health care employers to record or report COVID-19 worker fatalities.⁵⁰ Such information is essential for public health purposes. Occupation is routinely included on death certificates; public health agencies could also require recording of particular workplaces as well.

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- Employers could be required to devise and post their plans to protect workers and the public from COVID-19 exposures, attesting to the measures they have taken in response specifically to the pandemic.
 - Paid sick leave laws are critical for workplace safety during the pandemic. They are not preempted by OSHA or any other federal law. While there are new federal paid sick leave requirements under the Families First Coronavirus Response Act (FFCRA),⁵¹ they exclude millions of workers.⁵² The advocacy groups A Better Balance and the National Partnership for Women & Families have drafted model legislation for states or localities to cover the private sector gaps in the FFCRA.⁵³
 - It is also important to resist any proposed legislation that would provide a shield to employers for liability related to workers or customers who have contracted COVID-19.⁵⁴

Conclusion

While states and localities must be aware of limitations caused by OSHA preemption, this preemption is more limited than enforcers and policymakers commonly understand. There are various actions state and local enforcement agencies can take under current law without encountering OSHA preemption concerns. Similarly, there are numerous laws and policies that can be enacted, whether through legislation or executive orders, that do not raise such concerns. Moreover, state plans do not generally face OSHA preemption concerns. During the current pandemic, states and localities can take meaningful action to protect worker safety and health.



Endnotes

- ¹ Jane Flanagan is an Open Society Foundations Leadership in Government Fellow and Visiting Scholar at IIT Chicago-Kent College of Law; she was previously the Workplace Rights Bureau Chief in the Illinois Attorney General's Office. Terri Gerstein is the Director of the State and Local Enforcement Project at the Harvard Labor and Worklife Program and a Senior Fellow at the Economic Policy Institute; she was previously the Labor Bureau Chief in the New York State Attorney General's Office. Patricia Smith is Of Counsel at the National Employment Law Project; she was previously the Solicitor of Labor in the U.S. Department of Labor, as well as the Labor Commissioner of New York State. The authors would like to acknowledge Debbie Berkowitz, Director of NELP's Worker Safety and Health Program, as a contributor to this paper. The authors would also like to thank Ann Rosenthal for her review and helpful input. Thank you also to Emily Spieler for her input, including by sharing portions of a memo on OSHA preemption based on materials jointly prepared with Randi Rabinowitz.
- ² OSHA standards may be found starting at 29 C.F.R. §1910.
- ³ The term "occupational safety and health standard" means "a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment." 29 U.S.C. § 652(8).
- ⁴ OSHA Standards may be found starting at 29 C.F.R. §1910 and are available at: <https://www.osha.gov/laws-regs/regulations/industry>
- ⁵ 29 U.S.C. § 667.
- ⁶ 29 U.S.C. § 654.
- ⁷ Other actions protected from employer retaliation include participating in an OSHA inspection or reporting a work-related injury or illness. See 29 U.S.C. § 660(c).
- ⁸ A map of state plan states may be found at <https://www.osha.gov/stateplans> (last visited May 14, 2020). In addition, five states are state plans for public sector employees only.
- ⁹ Note, however, that in late April, the Solicitor of Labor for the U.S. DOL and the Deputy Assistant Secretary for OSHA released an unusual "statement of enforcement policy" related to the meat and poultry processing sector, suggesting that because of the invocation of the Defense Production Act, certain state actions may be preempted. The significance of this statement is highly questionable. See <https://www.dol.gov/newsroom/releases/osh/osh20200428-1> (last visited May 14, 2020).
- ¹⁰ *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).
- ¹¹ 29 U.S.C. § 667(a).
- ¹² The General Duty clause requires employers to keep their workplace free of serious recognized hazards. 29 USC § 654 (a).
- ¹³ 29 U.S.C. § 655.
- ¹⁴ *Gade v. National Solid Wastes Management Association*, 505 U.S. 88, 99-100 (1992) ("We conclude that § 18(a)'s preservation of state authority in the absence of a federal standard presupposes a background pre-emption of all state occupational safety and health standards whenever a federal standard governing the same issue is in effect.")
- ¹⁵ *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 894 (2000) (Stevens, J., dissenting) ("Because of the role of States as separate sovereigns in our federal system, we have long presumed that state laws—particularly those, such as the provision of tort remedies to compensate for personal injuries, that are within the scope of the States' historic police powers—are not to be pre-empted by a federal statute unless it is the clear and manifest purpose of Congress to do so.").
- ¹⁶ *Gade*, 505 U.S. at 92-94.
- ¹⁷ *Id.* at 107 (OSHA has long taken a similar position. In a 1981 Directive, for example, OSHA explained that "State enforcement of standards which on their face are predominantly for the purpose of protecting a class of persons larger than employees . . . when enforced for such a purpose" are not preempted.")
- ¹⁸ *Steel Inst. of New York v. City of New York*, 716 F.3d 31, 34 (2d Cir. 2013); 9 C.F.R. § 1926 Subpart CC governs "Cranes and Derricks in Construction," and Subpart DD governs "Cranes and Derricks Used in Demolition and Underground Construction."
- ¹⁹ *Steel Inst.*, 832 F.Supp.2d at 34.



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- ²⁰ OSHA did begin the process of adopting an infectious disease standard during the Obama Administration, but this standard was put on hold under the Trump Administration.
- ²¹ The CDC guidance may be found at <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html> (last accessed May 7, 2020).
- ²² The OSHA guidance may be found at <https://www.osha.gov/SLTC/covid-19/controlprevention.html#interim> (last accessed May 7, 2020).
- ²³ The joint CDC-OSHA guidance may be found at <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/meat-poultry-processing-workers-employers.html> (last accessed May 7, 2020).
- ²⁴ Although the Secretary of Labor has suggested that an employer's failure to follow such guidance could form the basis of an enforcement action, OSHA has not enforced this guidance to date nor would its enforcement change the preemption analysis. Letter from Secretary of Labor Eugene Scalia to Richard Trumka, President, AFL-CIO, April 30, 2020, available at: <https://aboutblaw.com/Qzv> (last visited April 30, 2020); reported by Reuters, U.S. Labor Secretary Defends Workplace Safety Record During Pandemic, N.Y. Times (April 30, 2020).
- ²⁵ See Endnote 9, above.
- ²⁶ For example, there are requirements regarding personal protective equipment and eye and face protection (29 CFR § 1910.132 and 1910.133) and sanitation (29 CFR § 1910.141).
- ²⁷ Me. Rev. Stat. Ann. tit. 26 § 561-a(1)(a).
- ²⁸ 28 R.I. Gen. Laws § 20-8.
- ²⁹ Mass. Gen. Laws Ch. 149 §§ 1-6.
- ³⁰ Mo. Rev. Stat. § 292.300. ("Every employer of labor in this state engaged in carrying on any work, trade or process which may produce any illness or disease peculiar to the work or process carried on, or which subjects the employee to the danger of illness or disease incident to such work, trade or process, to which employees are exposed, shall for the protection of all employees engaged in such work, trade or process, adopt and provide approved and effective devices, means or methods for the prevention of such industrial or occupational diseases as are incident to such work, trade or process.")
- ³¹ New York Labor Law § 200 et. seq.
- ³² Wis. Stat. §101.11 ("Every employer shall furnish employment which shall be safe for the employees therein and shall furnish a place of employment which shall be safe for employees therein and for frequenters thereof and shall furnish and use safety devices and safeguards, and shall adopt and use methods and processes reasonably adequate to render such employment and places of employment safe, and shall do every other thing reasonably necessary to protect the life, health, safety, and welfare of such employees and frequenters...No employer shall require, permit or suffer any employee to go or be in any employment or place of employment which is not safe, and no such employer shall fail to furnish, provide and use safety devices and safeguards, or fail to adopt and use methods and processes reasonably adequate to render such employment and place of employment safe, and no such employer shall fail or neglect to do every other thing reasonably necessary to protect the life, health, safety or welfare of such employees and frequenters...")
- ³³ *Wyeth v. Levine*, 555 U.S. 555, 565, 129 S.Ct. 1187, 1194-1195 (March 4, 2009).
- ³⁴ 29 U.S.C. § 653(b)(4). See *Lindsey v. Caterpillar*, 480 F.3d 202, 207-208 (3rd Cir. 2007) (allowing product liability action against tractor manufacturer, and citing a statement by then-Solicitor of Labor Lawrence Silberman during consideration of the OSH legislation that it "would in no way affect the present status of the law with regard to workmen's compensation legislation or private tort actions.").
- ³⁵ Complaint available at <https://towardsjustice.org/wp-content/uploads/2020/04/Rural-Community-Workers-Alliance-v-Smithfield-Foods-Inc.-Complaint.pdf>. Plaintiffs' Emergency Motion for a Preliminary Injunction or, in the Alternative, a Temporary Restraining Order and an Emergency Hearing on the Same available at <https://towardsjustice.org/wp-content/uploads/2020/04/Rural-Community-Workers-Alliance-v-Smithfield-Foods-Inc.-Preliminary-Injunction.pdf>. Both last accessed May 14, 2020.
- ³⁶ Corkery, Michael and Scheiber, Noam, *Missouri Pork Plant Workers Say They Can't Cover Mouths to Cough*. N.Y. Times (April 24, 2020).
- ³⁷ See <https://www.nbcnews.com/news/us-news/judge-dismisses-lawsuit-over-worker-safety-smithfield-pork-plant-n1201236>.
- ³⁸ Conversation with David Seligman, May 6, 2020.



- ³⁹ *Meat and Poultry Processing Workers and Employers: Interim Guidance from CDC and the Occupational Safety and Health Administration (OSHA)*, available at <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/meat-poultry-processing-workers-employers.html> (last accessed May 14, 2020).
- ⁴⁰ *People v. Chicago Magnet Wire Corp.*, 126 Ill. 2d 356, 369, 534 N.E.2d 962, 967 (1989).
- ⁴¹ *Id.*
- ⁴² Johnson, Matthew S. 2020. “[Regulation by Shaming: Deterrence Effects of Publicizing Violations of Workplace Safety and Health Laws](#).” March 2020. Paper accepted for publication in the *American Economic Review*.
- ⁴³ Illinois Ex. Order 2020-32 (COVID-19 Ex. Order No. 30), Section 1, available at: <https://www2.illinois.gov/Pages/Executive-Orders/ExecutiveOrder2020-32.aspx>, last accessed May 4, 2020.
- ⁴⁴ Michigan Ex. Order 2020-59, Section 11 (April 24, 2020), available at: https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-526894--,00.html, last accessed May 8, 2020.
- ⁴⁵ Michigan Ex. Order 2020-59, Section 20 (April 24, 2020), available at: https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-526894--,00.html, last accessed May 8, 2020.
- ⁴⁶ Berkowitz, Debbie and Sonn, Paul. [Protecting Worker Safety & Health in the COVID Crisis: A State & Local Model Policy Response](#). National Employment Law Project. April 2020.
- ⁴⁷ Some of the policy options, such as those related to unemployment insurance or workers’ compensation, could be enacted only at the state level, while others could be adopted by either states or localities.
- ⁴⁸ 8 CCR §5199.
- ⁴⁹ See, e.g., Illinois Department of Public Health, [Guidance for Food and Meat Processing Facilities](#) (April 25, 2020), available at: <http://dph.illinois.gov/covid19/community-guidance/guidance-food-and-meat-processing-facilities>, last accessed May 4, 2020. Fourteen state plans states require an employee/employer safety committee at some or all workplaces in their jurisdiction. See Section 1.2 of https://www.osha.gov/shpguidelines/docs/Safety_and_Health_Programs_in_the_States_White_Paper.pdf.
- ⁵⁰ See: <https://www.osha.gov/memos/2020-04-10/enforcement-guidance-recording-cases-coronavirus-disease-2019-covid-19> (last visited May 14, 2020).
- ⁵¹ The FFCRA text may be found at <https://www.congress.gov/bill/116th-congress/house-bill/6201/text>, last accessed May 4, 2020.
- ⁵² For a discussion of the many exemptions from federal paid leave coverage, see Glynn, Sarah Jane, *Coronavirus Paid Leave Exemptions Exclude Millions of Workers From Coverage*, Center for American Progress, April 17, 2020.
- ⁵³ A Better Balance and the National Partnership for Women & Families, *Model Law: Establishing Public Health Emergency Leave for a Public Health Emergency That Covers the Private-Sector Gaps in the Federal Families First Coronavirus Response Act*, April 6, 2020. Available at <https://www.abetterbalance.org/resources/emergencysickleavefederalgaps/>.
- ⁵⁴ Proposals for company immunity for liability are currently being proposed at the federal level. *U.S. Consumer Groups Urge Lawmakers Against Shielding Businesses From Coronavirus-Related Lawsuits*, Reuters, N.Y. Times, April 29, 2020.