

Eradicating Pandemic Health Inequities

Health Justice in Emergency Preparedness

Ruqaiijah Yearby

I INTRODUCTION

During the 2009 H1N1 flu (Swine flu) pandemic, the Centers for Disease Control and Prevention (CDC) recommended that those exhibiting symptoms practice social distancing and stay at home rather than go to work for seven to ten days.¹ A national survey showed that many low-wage and racial and ethnic minority workers were unable to practice social distancing or stay at home during the H1N1 pandemic because they could not work from home, take time off work, or lacked paid sick leave.² These workers were also not provided with protections against the spread of airborne diseases in the workplace. As a result, they had an increased risk of exposure to H1N1 within the workplace, which was associated with their higher rates of infections, hospitalizations, and deaths.³ In response to racial and ethnic inequities “in illness, hospitalization and death compared to whites” during the H1N1 pandemic and other emergency situations, such as Hurricane Katrina, the Department of Health and Human Services’ (HHS) Office of Minority Health published *Guidance for Integrating Culturally Diverse Communities into Planning for and Responding to Emergencies: A Toolkit*,⁴ and a 2012 report regarding health equity and pandemics.⁵ The toolkit and the report were outgrowths of a National

¹ Supriya Kumar et al., The Impact of Workplace Policies and Other Social Factors on Self-Reported Influenza-Like Illness Incidence During the 2009 H1N1 Pandemic, 102 *Am. J. Pub. Health* 132, 134, 135–39 (2012) (citing Ctrs. for Disease Control & Prevention, CDC Recommendations for the Amount of Time Persons with Influenza-Like Illness Should Be Away From Others, www.cdc.gov/hm1flu/guidance/exclusion.htm [last visited June 13, 2021]); Ctrs. for Disease Control & Prevention, 2009 H1N1 Flu (“Swine Flu”) and You, www.cdc.gov/hm1flu/qa.htm (last visited June 13, 2021).

² Kumar et al., supra note 1, at 134, 135–39.

³ Id.; Sandra Crouse Quinn et al., Racial Disparities in Exposure, Susceptibility, and Access to Health Care in the US H1N1 Influenza Pandemic, 101 *Am. J. Pub. Health* 285, 285–90 (2011).

⁴ Dennis Andrulis, Nadia Siddiqui & Jonathan Purtle, Guidance for Integrating Culturally Diverse Communities into Planning for and Responding to Emergencies: A Toolkit (Feb. 2011), www.aha.org/system/files/content/11/OMHDiversityPreparednesToolkit.pdf.

⁵ Dennis Andrulis et al., H1N1 Influenza Pandemic and Racially and Ethnically Diverse Communities in the United States: Assessing the Evidence of and Charting Opportunities for Advancing

Consensus Panel made up of national, state, and local experts from public health; emergency management, response, and relief; and racial and ethnic communities.⁶ Building on existing resources and evidence-based research, the toolkit and report acknowledged that there were social factors outside an individual's control, such as lack of paid sick leave, that led to pandemic health inequities. They also recommended establishing sustainable community partnerships to, among other things, measure and evaluate emergency plans and actions before, during, and after the emergency was over.

In 2010, the Department of Labor's Occupational Safety and Health Administration (OSHA) began working on an airborne infectious disease rule that would require employers to conduct a worksite hazard assessment to determine how an airborne infectious disease can spread within the worksite or to adopt specific measures to limit the spread of the airborne infectious disease there.⁷ Even though the recommendations of HHS and OSHA's proposed rule were created specifically to improve the government's emergency preparedness response and address pandemic health inequities, many of the federal and state government COVID-19 emergency preparedness laws and plans have not incorporated these recommendations or protections. In particular, many of the federal, state, and local laws do not provide paid sick leave for all essential workers or adopt protections from OSHA's proposed airborne infectious disease rule, which has led to pandemic health inequities in COVID-19 infections and deaths for essential workers.⁸ In 2021, the Biden Administration,⁹ and many employers, began to implement mandatory vaccine policies that required workers to get vaccinated or submit to testing.¹⁰ However, it is unclear how vaccine mandates would work or be applied to industries that have a high number of undocumented immigrants, who have

Health Equity, US Dep't of Health & Hum. Servs., Off. of Minority Health, at 13 (Sept. 2012), www.researchgate.net/publication/340390150_H1N1_Influenza_Pandemic_and_Racially_and_Ethnically_Diverse_Communities_in_the_United_States_Assessing_the_Evidence_and_Charting_Opportunities_for_Advancing_Health_Equity.

⁶ Id. at 4.

⁷ US Dep't of Lab., Occupational Safety & Health Admin., 2010 Infectious Diseases SER Background Document (2010) (on file with author) (hereinafter, Infectious Diseases Rulemaking); Summary of Stakeholder Meetings on Occupational Exposure to Infectious Disease (July 29, 2011), https://apic.org/Resource_/TinyMceFileManager/Advocacy-PDFs/Official_Summary_of_July_2011_OSHA_Meeting.pdf; US Dep't of Lab., Infectious Diseases SER Background Document (July 29, 2011) (on file with author).

⁸ Ruqaiyah Yearby & Seema Mohapatra, Systemic Racism, The Government's Pandemic Response, and Racial Inequities in COVID-19, 70 *Emory L. J.* 1419, 1433-51 (2021) (hereinafter, Yearby & Mohapatra, Systemic Racism).

⁹ Medicare & Medicaid Programs, Omnibus COVID-19 Health Care Staff Vaccination (2021); 29 C.F.R. § 1910.501 (2021).

¹⁰ Haley Messenger, From McDonald's to Goldman Sachs, Here are the Companies Mandating Vaccines for All or Some Employees, NBC News (Nov. 16, 2021), www.nbcnews.com/business/business-news/here-are-companies-mandating-vaccines-all-or-some-employees-m1275808; James Beck, Not Breaking News: Mandatory Vaccination Has Been Constitutional for over a Century, *Am. Bar*

limited access to vaccines.¹¹ Furthermore, the Supreme Court has prevented the Biden Administration's vaccine mandate for non-health care workers from coming into effect,¹² and many employers have begun to roll back their requirements.¹³ Thus, there is still a need for paid sick leave and workplace protections for essential workers, which is the focus of this chapter.

More than 55 million Americans were labeled "essential workers" during the COVID-19 pandemic.¹⁴ Health care workers have provided critical medical care to patients, while housekeeping and cleaning workers kept these institutions clean.¹⁵ Grocery store workers, farm workers, and meat processing workers have continued to feed the country. Warehouse, postal, transport, and airline workers have ensured the public receives their essential goods, while utility and communications workers have sustained access to the fundamental human needs of water, electricity, and the Internet.

Nationwide, these jobs have been associated with increased percentages of COVID-19 deaths.¹⁶ Specifically, research showed that working in the health care,

Ass'n (Oct. 28, 2021), www.americanbar.org/groups/litigation/committees/mass-torts/articles/2021/winter2022-not-breaking-news-mandatory-vaccination-has-been-constitutional-for-over-a-century/.

- ¹¹ Samantha Artiga, Nambi Ndugga & Olivia Pham, Immigrant Access to COVID-19 Vaccines: Key Issues to Consider, Kaiser Fam. Found. (Jan. 13, 2021), www.kff.org/racial-equity-and-health-policy/issue-brief/immigrant-access-to-covid-19-vaccines-key-issues-to-consider/; Shayna Greene, Fact Check: Are Undocumented Immigrants Ineligible for the COVID-19 Vaccine?, Newsweek (Jan. 15, 2021), www.newsweek.com/fact-check-are-undocumented-immigrants-ineligible-covid-19-vaccine-1562061.
- ¹² The mandatory vaccine requirement for all workers was found unconstitutional by the Supreme Court, while the requirement for health care workers was upheld. Nat'l Fed'n of Indep. Bus. v. Dep't of Labor, Occupational Safety & Health Admin., 142 S.Ct. 661 (2022) (all workers); Biden v. Missouri, 142 S.Ct. 647 (2022) (health care workers).
- ¹³ Disney Halts Vaccine Mandate for Theme Park Workers After Florida Ban, NY Times (Nov. 23, 2021), www.nytimes.com/live/2021/11/20/world/covid-boosters-vaccines-cases-mandates; Elizabeth Chuck, Growing Number of Companies Suspend Vaccine Mandates, Including Hospitals and Amtrak, NBC News (Dec. 16, 2021), www.nbcnews.com/news/us-news/companies-suspend-vaccine-mandates-hospitals-amtrak-rcna8903.
- ¹⁴ Celine McNicholas & Margaret Poydock, Who Are Essential Workers? A Comprehensive Look at Their Wages, Demographics, and Unionization Rates, Econ. Pol'y Inst.: Working Econ. Blog (May 19, 2020), www.epi.org/blog/who-are-essential-workers-a-comprehensive-look-at-their-wages-demographics-and-unionization-rates.
- ¹⁵ Petition for Emergency Rulemaking and Action to Allocate, Finance, and Compel the Manufacture of Personal Protective Equipment and Other Critical Materials to Safeguard Frontline Workers in the COVID-19 Crisis Pursuant to the Defense Production Act (Aug. 11, 2020), <https://biologicaldiversity.org/programs/energy-justice/pdfs/2020-08-11-APA-Petition-re-PPE-with-AFL.pdf>; Complaint for Declaratory and Injunctive Relief, Amalgamated Transit Union v. Azar, Case No. 20-cv-02876, 2020 WL 5983963 (D.D.C. Oct. 8, 2020).
- ¹⁶ Justin Feldman, Coronavirus Is an Occupational Disease that Spreads at Work, Jacobin (Jan. 19, 2021), <https://jacobinmag.com/2021/01/covid-19-business-work-public-health/>; Ruqaiyah Yearby, Meatpacking Plants Have Been Deadly COVID-19 Hot Spots – But Policies that Encourage Workers to Show Up Sick Are Legal, The Conversation (Feb. 26, 2021), <https://theconversation.com/meatpacking-plants-have-been-deadly-covid-19-hot-spots-but-policies-that-encourage-workers-to-show-up-sick-are-legal-152572>; Tiana Rogers et al., Racial Disparities in COVID-19 Mortality among Essential Workers in the United States, 12 *World Med. & Health Pol'y* 311, 318 (2020).

transportation, food preparation, cleaning, and service industries was strongly associated with a high risk of contracting COVID-19 and dying. Low-wage and racial and ethnic minority workers are disproportionately employed in these jobs.¹⁷ In fact, “Blacks disproportionately occupied the top nine occupations that placed them at high risk for contracting COVID-19 and potentially infecting their households.”¹⁸

Therefore, to put an end to health inequities in COVID-19 infections and deaths, the government should adopt the health justice framework, which provides a community-led approach for transforming the government’s emergency preparedness response. Based in part on principles derived from the reproductive justice, environmental justice, food justice, and civil rights movements, the health justice framework offers three principles to improve the government’s emergency preparedness response: (1) truth and reconciliation; (2) community engagement and empowerment; and (3) structural remediation and financial support.¹⁹ By adopting these principles, the government can not only acknowledge and fix the harm caused, but also improve its emergency preparedness response by providing essential workers with the power to develop and implement more effective laws and plans.

II EMERGENCY PREPAREDNESS AND THE COVID-19 PANDEMIC

In response to the COVID-19 pandemic, forty states and the District of Columbia issued stay-at-home or lockdown orders, which included social distancing measures.²⁰ Generally, these orders have relied on individuals to change their behavior to stop the spread of COVID-19.²¹ However, some individuals, such as essential workers, were not always protected by social distancing measures. For example, the St. Louis City stay-at-home order included social distancing mandates and other measures to stop the community spread of COVID-19.²² These requirements for

¹⁷ Rogers et al., *supra* note 16, at 319.

¹⁸ *Id.*

¹⁹ Yearby & Mohapatra, *Systemic Racism*, *supra* note 8, at 1433–51; Emily A. Benfer, Seema Mohapatra, Lindsay F. Wiley & Ruqaiijah Yearby, *Health Justice Strategies to Combat the Pandemic: Eliminating Discrimination, Poverty, and Health Inequities During and After COVID-19*, 19 *Yale J. Health Pol’y, L. Ethics* 122, 136–41 (2020); Emily A. Benfer & Lindsay F. Wiley, *Health Justice Strategies to Combat COVID-19: Protecting Vulnerable Communities During a Pandemic*, *Health Affs.* (Mar. 19, 2020), www.healthaffairs.org/doi/10.1377/hblog20200319.757883/full/; Amber Johnson, *Truth and Reconciliation in Health Care: Addressing Medical Racism Using a Health Justice Framework*, *Bill of Health* (Sept. 21, 2021), <https://blog.petriefrom.law.harvard.edu/2021/09/21/truth-and-reconciliation-health-justice/>.

²⁰ State COVID-19 Data and Policy Actions, Kaiser Fam. Found., www.kff.org/report-section/state-covid-19-data-and-policy-actions-policy-actions/#socialdistancing (last updated Feb. 10, 2022).

²¹ Lindsay Wiley & Samuel Bagenstos, *The Personal Responsibility Pandemic: Centering Solidarity in Public Health and Employment Law*, 52 *Ariz. State L. J.* 1235, 1235–36 (2020).

²² St. Louis City Dep’t of Pub. Health, 2019 Novel Coronavirus (“COVID-19”), *Safer At Home Order* (Mar. 21, 2020), www.stlouis-mo.gov/government/departments/health/communicable-disease/covid-19/orders/health-commissioner-order-5.cfm.

social distancing were not applied to essential businesses, and thus did not protect essential workers. Furthermore, neither the federal nor state emergency preparedness laws and plans provided all essential workers with paid sick leave or workplace protections from exposure to COVID-19.²³ As a result, many essential workers were left unprotected against workplace COVID-19 infections, leading to pandemic health inequities.

A Paid Sick Leave

During the COVID-19 pandemic, most essential workers were employed in the health care (30 percent) and in the food and agricultural (21 percent) industries, which experienced high rates of COVID-19 infections and deaths.²⁴ These cases and deaths have disproportionately harmed racial and ethnic minority essential workers. As of June 25, 2021, more than 513,773 health care personnel have tested positive for COVID-19, and 1,683 have died, a figure which is not broken down by occupation or race.²⁵ Yet a National Nursing Union report shows that nurses of Filipino descent comprise 31.5 percent of nurse deaths from COVID-19, but only account for 4 percent of the nursing population.²⁶ COVID-19 has not only harmed essential workers, but also their families and the communities in which they live.

In 2020, data associated Latino and Black children's higher risk of COVID-19-related hospitalizations with social factors, such as the employment conditions of their parents (e.g., serving as an essential worker).²⁷ Moreover, in Boston, data showed that the highest number of COVID-19 cases are concentrated in communities with a "very high proportion of both COVID-19-essential workers and residents of color."²⁸ These pandemic health inequities are in part due to essential workers' lack of paid sick leave, which increases essential workers' exposure to infectious diseases, such as COVID-19, because they must go to work sick, often infecting other workers as a consequence.²⁹

²³ Lindsay Wiley, Ruqaiyah Yearby & Andrew Hammond, *Lex-Atlas US COVID-19 Response Report*, in *Oxford Compendium of National Legal Responses to COVID-19* (2021), <https://lexatlas-c19.org/usa/>.

²⁴ McNicholas & Poydock, *supra* note 14.

²⁵ Ctrs. for Disease Control & Prevention, *Cases & Deaths among Healthcare Personnel*, <https://covid.cdc.gov/covid-data-tracker/#health-care-personnel> (last visited June 27, 2021).

²⁶ Allana Akhtar, *Filipinos Make up 4% of Nurses in the US, but 31.5% of Nurse Deaths from COVID-19*, *Bus. Insider* (Sept. 29, 2020), www.businessinsider.com/filipinos-make-up-disproportionate-covid-19-nurse-deaths-2020-9.

²⁷ Chelsea Janes, *Hispanic, Black Children at Higher Risk of Coronavirus-Related Hospitalization, CDC Finds*, *Wash. Post* (Aug. 7, 2020), www.washingtonpost.com/health/2020/08/07/hispanic-black-children-higher-risk-coronavirus-related-hospitalization-cdc-finds/.

²⁸ Lauren Chambers, *Data Show COVID-19 Is Hitting Essential Workers and People of Color Hardest*, *ACLU Massachusetts* (2020), <https://data.aclum.org/2020/04/07/covid-19-disproportionately-affects-vulnerable-populations-in-boston/>.

²⁹ Quinn et al., *supra* note 3, at 285–90; Kumar et al., *supra* note 1, at 134, 135–39.

Research shows that without paid sick leave, working people are one and a half times more likely to go to work with a contagious disease and three times more likely to go without medical care compared to those with paid sick days.³⁰ Many essential workers, including some nursing home workers, home health workers, and food and agriculture workers, do not have paid sick leave.³¹ Furthermore, compared to White workers, Black workers are less likely to have paid sick leave,³² even after federal and state action to address COVID-19.

The federal government enacted four major COVID-19 laws providing economic relief: the Families First Coronavirus Response Act; the Coronavirus Aid, Relief, and Economic Security Act; the Consolidated Appropriations Act; and the American Rescue Plan Act.³³ These laws provided paid sick leave for workers employed at businesses with fewer than 500 workers.³⁴ Many essential businesses employ more than 500 workers, so their workers are not covered. The laws also did not cover home health workers and undocumented immigrants, even though they were often designated as essential workers. Some states, such as California and New York, did enact paid sick leave laws, yet many essential workers were still left without paid sick leave.³⁵ The far-reaching impact of pandemic health inequities due to the lack of paid sick leave is best shown by reference to the food and agriculture industry.

Most meat and processing workers do not have paid sick leave and the economic relief bills did not apply to them because meat and poultry processing plants tend to employ more than 500 workers. As of August 31, 2021, 91,642 food and agriculture workers were infected with COVID-19, and at least 465 workers had died.³⁶ Racial and ethnic minority workers represent most of these cases and deaths. The CDC noted in May 2020 that there were 16,233 confirmed cases of COVID-19 infections for meat and poultry processing workers and 86 COVID-19-related deaths in 239 plants.³⁷ Of the 9,919 (61 percent) cases with racial and ethnic data, 56 percent of

³⁰ Benfer & Wiley, *supra* note 19.

³¹ Yearby & Mohapatra, *Systemic Racism, supra* note 8; Ruqaiyah Yearby & Seema Mohapatra, *Law, Structural Racism, and the COVID-19 Pandemic*, 7 *Oxford J. L. Biosciences* 1 (2020); Ruqaiyah Yearby, *Gaps in Worker Protections that Increase Essential Workers' Exposure to COVID-19*, in *COVID-19 Policy Playbook: Legal Recommendations for a Safer, More Equitable Future*, 193, 194–95 (2020), https://static1.squarespace.com/static/5956e16e6b8f5b8c45f1c216/t/6058f406daa8245f7d98ae77/1616442374635/C_hp30-Yearby_COVIDPolicyPlaybook-March2021.pdf; Phillip Sloane et al., *Addressing Systemic Racism in Nursing Homes: A Time for Action*, 22 *JAMDA* 886, 887 (2021).

³² Elise Gould & Valerie Wilson, *Black Workers Face Two of the Most Lethal Preexisting Conditions for Coronavirus – Racism and Economic Inequality*, *Econ. Pol'y Inst.* (June 1, 2020), www.epi.org/publication/black-workers-covid/.

³³ Wiley, Yearby & Hammond, *supra* note 23.

³⁴ Yearby & Mohapatra, *Systemic Racism, supra* note 8; Yearby & Mohapatra, *Law, Structural Racism, and the COVID-19 Pandemic, supra* note 31.

³⁵ Wiley, Yearby & Hammond, *supra* note 23.

³⁶ Food & Env't Reporting Network, *Mapping COVID-19 Outbreaks in the Food System*, <https://thefern.org/2020/04/mapping-covid-19-in-meat-and-food-processing-plants/> (last visited Aug. 31, 2021).

³⁷ Michelle A. Waltenburg et al., *Update: COVID-19 Among Workers in Meat and Poultry Processing Facilities – United States, April–May 2020*, 69 *Morbidity & Mortality Wkly. Rep.* 887, 888 (2020).

COVID-19 cases occurred in Latinos, 19 percent in non-Latino Blacks, 13 percent in non-Latino Whites, and 12 percent in Asians.³⁸ These infections have also impacted the communities in which these workers live and, more broadly, the entire nation.

Research shows that having a meat or poultry processing plant in the county is associated with a 51–75 percent increase in COVID-19 cases and a 37–50 percent increase in deaths of all people in the county, not just those who worked at the plant.³⁹ The same research shows that between 3 and 4 percent of all COVID-19 deaths and 6–8 percent of all COVID-19 cases in the United States are tied to meat and poultry processing plants.⁴⁰ Infections tied to the lack of paid sick leave are further exacerbated by the government’s failure to enforce worker health and safety protections.

B *Lack of Worker Health and Safety Protections*

Neither the federal government nor the states have adequately protected essential workers against workplace exposure to COVID-19. OSHA, and the twenty-one states with OSHA-approved plans,⁴¹ have the power to require employers to provide employees with personal protective equipment, such as masks, and develop a respiratory protection standard to prevent occupational disease.⁴² Moreover, employers have a “general duty” to provide employees with a place of employment free from recognized hazards that are causing or likely to cause death or serious harm.⁴³

However, the respiratory standard and the “general duty” protections do not apply to some nursing home, home health, and agricultural workers because they are classified as independent contractors. Even if the protections apply, they are insufficient to address COVID-19 because neither the respiratory standard nor the General Duty Clause requires employers to conduct a worksite hazard assessment to determine how an airborne infectious disease can spread within the worksite or adopt specific measures to limit the spread of the airborne infectious disease there. OSHA noted the inadequacies of these laws to address airborne infectious diseases when discussing its 2010 proposed airborne infectious disease rule.⁴⁴

³⁸ *Id.*

³⁹ Charles Taylor, Christopher Boulos & Douglas Almond, *Livestock Plants and COVID-19 Transmission*, Proceedings of the National Academy of Sciences 1–2 (2020), www.pnas.org/content/early/2020/11/25/2010115117.long.

⁴⁰ *Id.*

⁴¹ The twenty-one states include Alaska, Arizona, California, Hawaii, Indiana, Iowa, Kentucky Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oregon, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, and Wyoming. Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651 et seq. (1970); 29 C.F.R. § 1910.134 (2011).

⁴² Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651 et seq. (1970); 29 C.F.R. § 1910.134 (2011).

⁴³ 29 U.S.C. § 654.

⁴⁴ Infectious Diseases Rulemaking, *supra* note 7; Summary of Stakeholder Meetings on Occupational Exposure to Infectious Disease, *supra* note 7; Infectious Diseases SER Background Document, *supra* note 7.

Instead of adopting the protections in the proposed rule, OSHA, in partnership with the CDC, has issued numerous advisory worker health and safety guidance. All the guidance discusses very similar issues, such as the potential for workplace exposure and the need to create a COVID-19 assessment and control plan. Nevertheless, the guidance does not *require* the adoption of specific measures to limit the spread of COVID-19 in the workplace. Additionally, neither the guidance nor OSHA require employers to report infected workers or test all workers exposed to COVID-19.

In 2014, OSHA adopted a rule requiring the recording and reporting of occupational illness and injury.⁴⁵ Under the rule, all employers with more than ten employees, who are covered under the Occupation Safety and Health Act, must report work-related fatalities to OSHA within eight hours of the event. The employers also must report all work-related, in-patient hospitalizations to OSHA within twenty-four hours of the event.⁴⁶ However, during the COVID-19 pandemic, OSHA requires employers to report worker hospitalizations for COVID-19 *only if* the hospitalization occurs within 24 hours of their workplace exposure to the virus.⁴⁷ Furthermore, employers need to report worker infections and hospitalizations *only if* the worker can show that the infection occurred in the workplace. Limiting reporting of worker infections based on when the hospitalization occurred or where the exposure occurred keeps the government from being able to prevent, mitigate, and contain the spread of COVID-19.

Identifying all workers infected with COVID-19 and mandating the testing of all exposed workers is necessary to track infections and protect workers from being exposed to COVID-19 in the workplace. The pandemic health inequities caused by these gaps in enforcement and reporting are best illustrated by the high rates of COVID-19 infections and deaths of essential workers. In June 2020, the owner of a pistachio farm in Wasco failed to report worker COVID-19 cases to the government or test exposed workers. Consequently, workers at the farm, many of whom were racial and ethnic minorities, did not know other workers had tested positive for COVID-19 until they learned it from the media. By that time, 150 workers and 65 family members had tested positive.⁴⁸ After the announcement, the farm started to make masks available free of cost, whereas before they were charging workers \$8 per mask.⁴⁹

⁴⁵ 29 C.F.R. § 1904 (2014).

⁴⁶ 29 C.F.R. § 1904.39.

⁴⁷ 29 C.F.R. § 1904; US Dep't of Lab., Occupational Safety & Health Admin., Reporting COVID-19 Fatalities and In-patient Hospitalizations to OSHA, www.osha.gov/sites/default/files/publications/OSHA4129.pdf (last visited May 15, 2022).

⁴⁸ Associated Press, Farmworkers at Central California Pistachio Farm Strike After Dozens Test Positive for the Coronavirus, LA Times (June 25, 2020), www.latimes.com/california/story/2020-06-25/farmworkers-at-central-california-pistachio-strike-after-dozens-test-positive-for-the-coronavirus; Jacqueline Garcia, Dozens of Pistachio Plant Workers Infected with COVID-19, KQED (July 6, 2020), www.kqed.org/news/11827498/dozens-of-pistachio-plant-workers-infected-with-covid-19; Dale Yurong, Protest Held After Dozens of Farmworkers Test Positive for COVID-19 at Wasco Packing House, ABC30 Fresno (July 16, 2020), <https://abc30.com/wasco-coronavirus-covid-packing-house-primex-farms/6321004/>.

⁴⁹ Associated Press, *supra* note 48.

Moreover, although workers across the United States have filed over 5,000 complaints regarding workplace hazards that increase the risk of COVID-19 infection, OSHA has only issued one citation related to the pandemic and closed many of these complaints without in-person inspections.⁵⁰ Instead, OSHA has relied on employers to make a “good faith” effort to comply with its advisory worker health and safety guidance rather than issue mandatory requirements or conduct in-person inspections. Under the Biden Administration, OSHA has issued an emergency temporary standard to provide mandatory workplace COVID-19 protections for health care workers,⁵¹ but this leaves many essential workers unprotected.

For example, a COVID-19 outbreak at the Farmer John pork processing plant in California began in 2020 and continued for nearly a year, “with more than 300 cases reported in January (2021) alone.”⁵² Moreover, an April 2021 report showed that essential workers in California accounted for 87 percent of the COVID-19 deaths in adults aged 18 to 65.⁵³ Warehouse workers “had the highest statewide increase in pandemic related deaths (57 percent),” compared to a 25 percent increase for those not working.⁵⁴ Other California industries with high rates of worker deaths include agriculture (47 percent), food processing (43 percent), and nursing homes (39 percent).⁵⁵

III HEALTH EQUITY: SOCIAL DETERMINANTS OF HEALTH AND HEALTH JUSTICE

To eradicate pandemic health inequities, the federal and state governments should revise their emergency preparedness laws and plans, using the three principles of the health justice framework: (1) truth and reconciliation;⁵⁶ (2) community engagement and empowerment; and (3) structural remediation and financial support.⁵⁷

⁵⁰ Ted Knutson, OSHA has Issued Just One COVID-19 Enforcement Action After 5,000 Complaints, House Dems Claim, *Forbes* (May 28, 2020), www.forbes.com/sites/tedknutson/2020/05/28/osha-is-covid-19-invisible-1-enforcement-after-5000-complaints-charge-dems/; US Dep’t of Lab., Office of Inspector Gen., COVID-19: Increased Worksite Complaints and Reduced OSHA Inspections Left US Workers’ Safety at Increased Risk (Feb. 25, 2021), www.oig.dol.gov/public/reports/oa/2021/19-21-003-10-105.pdf.

⁵¹ 29 C.F.R. §§ 1910.502, 1910.504, 1910.505, 1910.509 (2021).

⁵² Leah Douglas & Georgia Gee, A COVID Outbreak at a California Meatpacking Plant Started a Year Ago – and Never Went Away, *Mother Jones* (Mar. 16, 2021), www.motherjones.com/food/2021/03/covid-outbreak-at-a-california-meatpacking-plant-started-a-year-ago-and-never-went-away/.

⁵³ Univ. of Cal. Merced, Fact Sheet: The Pandemic’s Toll on California Workers in High Risk Industries (Apr. 2021), https://clc.ucmerced.edu/sites/clc.ucmerced.edu/files/page/documents/fact_sheet_-_the_pandemics_toll_on_california_workers_in_high_risk_industries.pdf.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Maya Sabatello et al., Structural Racism in the COVID-19 Pandemic: Moving Forward, 21 *Am. J. Bioethics* 56, 56–58 (2021).

⁵⁷ Yearby & Mohapatra, Systemic Racism, *supra* note 8, at 1433–51; Benfer, Mohapatra, Wiley & Yearby, *supra* note 19, at 136–41; Benfer & Wiley, *supra* note 19; Johnson, *supra* note 19.

A Recommendations

First, the process of developing and implementing new emergency preparedness laws and plans must include a truth and reconciliation process that provides an opportunity for communities to heal and build trusting and respectful relationships with the government, which is necessary for meaningful community engagement. As the W. K. Kellogg Foundation notes, transformational and sustainable change must include “ways for all of us to heal from the wounds of the past, to build mutually respectful relationships across racial and ethnic lines that honor and value each person’s humanity, and to build trusting intergenerational and diverse community relationships that better reflect our common humanity.”⁵⁸

Providence, Rhode Island adopted a truth and reconciliation process to address racial inequities, beginning with the mayor and a group of advisers meeting to develop “a plan for sharing the state’s role throughout history in the institution of slavery, genocide of Indigenous people, forced assimilation[,] and seizure of land.” This was followed by city leaders reviewing laws and policies that resulted in discrimination against Black and Indigenous people and concluded with community discussion about the “state’s history and the ways in which historical injustices and systemic racism continue to affect society today.”⁵⁹ This process should be used as a model to provide essential workers and their communities with an opportunity to share their experiences and stories with the government, particularly policymakers and regulators.

Second, essential workers, particularly low-wage and racial and ethnic minority workers, must be empowered and engaged as leaders in the development and implementation of new emergency preparedness laws and plans. Community engagement is a key priority of public health. In fact, the HHS 2011 toolkit and 2012 report noted that “effective preparedness and response requires the ongoing and active engagement of diverse communities” before, during, and after an emergency, through “sustainable partnerships between community representatives and the public health preparedness systems”; only then “can plans and programs be tailored to a community’s distinct social, economic, cultural, and health-related circumstances.”⁶⁰ The government must engage communities and give them the power to lead the process of revising, implementing, and evaluating emergency preparedness laws and plans before, during, and after an emergency.⁶¹ For example, there

⁵⁸ W. K. Kellogg Foundation, Truth, Racial Healing and Transformation, <https://healourcommunities.org/> (last visited June 28, 2021).

⁵⁹ Madeleine List, Providence Mayor Signs Order to Pursue Truth, Reparations for Black, Indigenous People, Providence J. (July 16, 2020), www.providencejournal.com/story/news/2020/07/16/providence-mayor-signs-order-to-pursue-truth-reparations-for-black-indigenous-people/42496067/.

⁶⁰ Andrulis, Siddiqui & Purtle, *supra* note 4, at 5.

⁶¹ Athena K. Ramos et al., “No Somos Maquinas” (We Are Not Machines): Worker Perspectives of Safety Culture in Meatpacking Plants in the Midwest, 64 *Am J. Indus, Med* 84, 90–92 (2021); Yearby & Mohapatra, Systemic Racism, *supra* note 8; Yearby & Mohapatra, Law, Structural Racism, and the COVID-19 Pandemic, *supra* note 31.

should be a community-led, employee safety board that consults the White House and assists in the development and implementation of an emergency preparedness worker protection agenda. There should also be community-led, employee safety boards that advise HHS, OSHA, and the states in the creation, implementation, tracking, and evaluation of new emergency preparedness laws and plans.⁶²

The Los Angeles County supervisor is already empowering essential workers to play a central role in COVID-19 mitigation efforts. The county unanimously approved a program in which workers from certain sectors (the food and apparel manufacturing, warehousing and storage, and restaurant industries) will form public health councils to help ensure that employers follow coronavirus safety guidelines.⁶³ Communities and individual community members involved in this process of revising, implementing, and evaluating emergency preparedness laws and plans should also be paid. For instance, President Biden issued a *National Strategy for the COVID-19 Response and Pandemic Preparedness* that has directed the federal government to use and pay community members and community health workers as part of the COVID-19 pandemic response.⁶⁴

Third, emergency preparedness laws and plans must change the structure of the emergency preparedness response by incorporating measures to address employment factors and providing financial support for essential workers, their families, and the communities in which they live. In particular, the emergency preparedness laws and plans must mandate that employers who employ essential workers provide them with health and safety protections to prevent the workplace spread of disease during a pandemic. This could be accomplished by OSHA and the OSHA-approved states adopting the 2010 proposed airborne infectious disease rule.⁶⁵

Furthermore, all federal and state emergency preparedness laws and plans must mandate that if an individual is employed in an essential job during a pandemic, that individual should automatically receive paid sick leave – without exception. Paid sick leave “reduces costly spending on emergency health care, reduces the rate of influenza contagion, and saves the US economy \$214 billion annually in increased productivity and reduced turnover.”⁶⁶ Some cities, such as Oakland,

⁶² David Michaels & Gregory R. Wagner, Halting Workplace COVID-19 Transmission: An Urgent Proposal to Protect American Workers, Century Found. (Oct. 15, 2020), <https://tcf.org/content/report/halting-workplace-covid-19-transmission-urgent-proposal-protect-american-workers/>.

⁶³ Leila Miller, LA County Approves Program for Workers to Form Public Health Councils to Curb Coronavirus Spread (Nov. 10, 2020), www.latimes.com/california/story/2020-11-10/la-me-la-county-public-health-councils.

⁶⁴ President Joe Biden, National Strategy for the COVID-19 Response and Pandemic Preparedness (Jan. 2021), www.whitehouse.gov/wp-content/uploads/2021/01/National-Strategy-for-the-COVID-19-Response-and-Pandemic-Preparedness.pdf.

⁶⁵ Infectious Diseases Rulemaking, *supra* note 7; Summary of Stakeholder Meetings on Occupational Exposure to Infectious Disease, *supra* note 7; Infectious Diseases SER Background Document, *supra* note 7.

⁶⁶ Benfer & Wiley, *supra* note 19.

California, are already requiring that employers provide paid sick leave to essential workers during the pandemic.⁶⁷

Additionally, until the end of the COVID-19 pandemic, the government should provide essential workers with financial support, such as hazard pay, savings accounts, and survivorship benefits for their families. This will ensure essential workers receive compensation for risking their lives and that their families are provided for if the essential worker dies. Additionally, based on suggestions from a coalition of South Dakota meat plant workers, the state and federal government should use federal COVID-19 economic relief funds to invest directly in low-income communities and “communities of color severely and disproportionately impacted by the deadly virus.”⁶⁸ This can be accomplished through the implementation of a guaranteed basic income until the end of the pandemic for these communities.⁶⁹ The mayors of Mount Vernon, New York and St. Paul, Minnesota have already used part of their federal economic relief money to provide a guaranteed income program for some residents. The federal and state government already have the power, tools, and money to implement these changes.

B Implementation

During the COVID-19 pandemic, Congress enacted economic relief bills that either provided authority or left room for the President, HHS, and the states to shift these funds to support states’ individual responses to COVID-19. In particular, HHS has the authority under the federal economic relief bills to regulate the distribution of some of the funds. HHS has used this authority to approve the use by Arkansas and New Hampshire of relief funds to provide hazard pay to home health workers.⁷⁰ HHS should use this authority to direct all states to provide paid sick leave to essential workers left out of the bills, including home health care workers. President Biden has the authority to address the lack of workplace protections for essential workers. On January 21, 2021, President Biden issued an executive order concerning worker health and safety, as well as a COVID-19 plan with recommendations

⁶⁷ Bay City News, Oakland City Leaders OK Paid Sick Leave for Essential Workers, NBC Bay Area (May 13, 2020), www.nbcbayarea.com/news/local/oakland-city-leaders-ok-paid-sick-leave-for-essential-workers/2289529/.

⁶⁸ Letter from Taneza Islam, Exec. Dir., S.D. Voices for Peace, to Kristi Noem, Gov. of S.D. (Apr. 30, 2020), www.argusleader.com/story/news/2020/04/30/letter-asks-noem-meet-meatpacking-workers-before-smithfield-plant-reopens/3058042001/.

⁶⁹ Kimberly Amadeo & Thomas J. Brock, What is Universal Basic Income? Pros and Cons of a Guaranteed Income, *The Balance* (Aug. 19, 2020), www.thebalance.com/universal-basic-income-4160668.

⁷⁰ Elisha Morrison, CMS Approves Some Healthcare Worker Bonuses, *Benton Courier* (Apr. 16, 2020), www.bentoncourier.com/covid-19/cms-approves-some-healthcare-worker-bonuses/article_3946ade8-800c-11ea-944a-1b151690787e.html; KATV, Governor Announces Bonus Pay for Some Health Workers; COVID-19 Death Toll Rises to 34, *ABC7* (Apr. 15, 2020), <https://katv.com/news/local/governor-announces-bonus-pay-for-health-workers-at-long-term-care-facilities>.

to address worker safety issues.⁷¹ As a result, OSHA adopted mandatory COVID-19 workplace protections for health care workers. The President should issue another executive order directing OSHA to publish and adopt the 2010 airborne infectious disease rule for all workers.

Moreover, with the enactment of the Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Congress directed the Secretary of HHS to coordinate a strategy for developing and implementing a national emergency preparedness response for public health emergencies and bioterrorism.⁷² In 2006, Congress amended the Public Health Services Act directing the Secretary of HHS to lead “all federal public health and medical response to public health emergencies and incidents.”⁷³ These acts expanded federal authority for responding to public health emergencies and provided funding for federal and state emergency preparedness plans. Thus, the Secretary of HHS has, and should use, the authority to develop and implement a revised national emergency preparedness response for public health emergencies and bioterrorism that includes addressing employment factors. Using the funding power, HHS should require states that receive funding for emergency preparedness under the Public Health Services Act to implement a truth and reconciliation process as well as to engage communities in the revision of emergency preparedness laws and plans.

These are just a few suggestions for eradicating pandemic health inequities experienced by essential workers. However, to fully address pandemic health inequities, the federal and state government must ensure that essential workers, particularly low-income and racial and ethnic minority workers, are guiding the ongoing process to revise emergency preparedness laws and plans, even when there is not an emergency situation.

⁷¹ Exec. Order No. 13,999, 86 Fed. Reg. 7,211 (Jan. 21, 2021); Biden, *supra* note 64.

⁷² Pub L. No. 107-188, 116 Stat. 594.

⁷³ Pub. L. No. 109-417, 120 Stat. 2832.