

Hearing on  
“Examining Liability During the COVID-19 Pandemic”

Questions for the Record for Ms. Rebecca Dixon  
Submitted May 19, 2020

QUESTIONS FROM SENATOR FEINSTEIN

1. In the lawsuits brought to date by workers seeking protections against COVID-19, what forms of workplace protections did the workers request?

In one high-profile case, Smithfield Foods meat processing workers in Missouri sought not any monetary damages, but rather an injunction under the state’s common-law public nuisance doctrine to get their employer to provide masks, ensure social distancing, give employees an opportunity to wash their hands while on the line, provide tissues, change its leave policy to discourage individuals to show up to work when they have symptoms, and give workers access to COVID-19 testing. They sued to enforce all the recommendations of the CDC and OSHA, but that neither agency will require or enforce.

While the federal court dismissed that case at the outset, finding that OSHA was “better positioned to make these determinations,”<sup>1</sup> the mere fact that it was brought has resulted in Smithfield taking many actions to better protect its workers. For example, Smithfield posted signs noting that everyone was required to wear masks and supervisors were to enforce the policy; it added an additional tent area for lunchtime and modified its clocking in and out procedures to allow for social distancing; it reduced the number of hogs being slaughtered in order to rotate teams and increase social distancing; it reinforced previously flimsy plexiglass barriers between workers on the slaughter line and adjusted them to make sure that workers faces were covered; it began allowing workers to take paid sick leave upon showing symptoms of illness, rather than requiring them to wait for a diagnosis; and eliminated a policy that would deny “responsibility bonuses” to workers who took sick leave.<sup>2</sup>

In another important case, McDonald’s workers in Illinois sought immediate injunctive relief in state court, alleging that four of the company’s Chicago’s restaurants were creating a public nuisance by forcing workers to work in close quarters with colleagues and customers, failing to provide sufficient PPE and hand sanitizer, forcing workers to reuse dirty masks or gloves, and silencing workers from speaking about colleagues who were infected or absent.<sup>3</sup> The workers asked the court to order McDonald’s to supply adequate PPE and hand sanitizer, implement policies requiring all workers and customers to wear face coverings, train workers

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<sup>1</sup>See Order Granting Defendants’ Motion to Dismiss, *Rural Community Workers Alliance v. Smithfield Foods, Inc.*, No. 5:20-CV-0063-DGK, at 15–16 (W.D. Mo. May 5, 2020), <https://www.publicjustice.net/wp-content/uploads/2020/05/RCWAvSmithfieldPIRuling.pdf>; see also Fatima Hussein, *Smithfield Wins Dismissal of Meat Workers’ Virus Safety Suit*, Bloomberg Law (May 5, 2020), <https://news.bloomberglaw.com/daily-labor-report/smithfield-wins-dismissal-of-meat-workers-virus-safety-suit>.

<sup>2</sup> See Press Release: In Wake Of Missouri Court Decision In Smithfield Packing Plant Case, Workplace Advocates Say Industry Is On Notice That Changes Must Be Made, Public Justice, May 5, 2020, <https://www.publicjustice.net/wp-content/uploads/2020/05/Smithfield-Preliminary-Injunction-Reaction-PR.pdf>; Jim Salter, “Judge dismisses Missouri lawsuit over meat worker safety,” Associated Press, May 6, 2020, <https://apnews.com/3471b794695bc5c2c40a76af08af805e>.

<sup>3</sup> Robert Channick, “Chicago McDonald’s workers file class-action lawsuit alleging COVID-19 failures put employees and customers at risk,” Chicago Tribune, May 19, 2020, <https://www.chicagotribune.com/coronavirus/ct-coronavirus-chicago-mcdonalds-lawsuit-workers-ppe-20200519-far75d4tuvfehnbnm2a4i4kzy-story.html>.

on precautions to prevent infection, and disclose to workers if a colleague is believed to be infected. While the workers' claims are still pending, their lawsuit has shined a bright spotlight on the chain's safety practices. And it now appears that McDonald's is moving to settle the workers' claims.<sup>4</sup>

2. Have workers claimed their employers have retaliated against them for requesting necessary workplace protections?

Yes. After workers requested better safety and health protections at the Staten Island Amazon warehouse, at least one worker has died of COVID-19, and nearly 30 workers have fallen ill. Amazon responded to the workers' complaints in March by firing one protesting worker.<sup>5</sup> At the company's Shakopee, Minnesota warehouse, a worker who raised concerns with coworkers and management about workers' inability to remain socially distant was fired in April.<sup>6</sup> And Amazon even fired other non-warehouse employees who spoke out about conditions in its warehouses.<sup>7</sup>

Long-term care workers have also reported being retaliated against for requesting necessary workplace protections against COVID-19. At one Chicago nursing home, management threatened to call the police on workers who requested more PPE and other protections, threatened them with firing, and suspended one of the workers for three days.<sup>8</sup> In another Illinois nursing home, a nurse alleges she was fired for raising concerns during a safety meeting.<sup>9</sup> In a Jersey City, New Jersey nursing home, two former nurses allege that they were fired for raising concerns and refusing to work while infected with COVID-19.<sup>10</sup> An East Bay, California nursing home began retaliating against an employee after he appeared in a news report about the home's failure to provide adequate PPE; he was ultimately fired and escorted off the property by police.<sup>11</sup>

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<sup>4</sup> Celeste Bott, "McDonald's Aims to Settle Workers' COVID-19 Safety Suit," Law360, May 20, 2020, <https://www.law360.com/articles/1277614/mcdonald-s-aims-to-settle-workers-covid-19-safety-suit>.

<sup>5</sup> Alina Selyukh, "Amazon Warehouse Safety 'Inadequate,' N.Y. Attorney General's Office Says," National Public Radio, April 27, 2020, <https://www.npr.org/2020/04/27/846438983/amazon-warehouse-safety-inadequate-n-y-attorney-general-s-office-says>; Josh Dzieza, "An Amazon warehouse worker in New York has died of COVID-19," The Verge, May 5, 2020, <https://www.theverge.com/2020/5/5/21248427/amazon-warehouse-worker-coronavirus-death-new-york-covid-19>; Lesley Stahl, "Examining Amazon's Treatment of Its Workers," 60 Minutes, May 10, 2020, <https://www.cbsnews.com/news/amazon-workforce-safety-60-minutes-2020-05-10/>.

<sup>6</sup> Sara Ashley O'Brien, "Fear and a firing inside an Amazon warehouse," CNN Business, April 22, 2020, <https://www.cnn.com/2020/04/22/tech/amazon-warehouse-bashir-mohamed/index.html>.

<sup>7</sup> Jay Greene, "Amazon fires two tech workers who criticized the company's warehouse workplace conditions," Washington Post, April 13, 2020, <https://www.washingtonpost.com/technology/2020/04/13/amazon-workers-fired/>.

<sup>8</sup> Suzy Khimm, "The forgotten front line: Nursing home workers say they face retaliation for reporting COVID-19 risks," NBC News, May 19, 2020, <https://www.nbcnews.com/news/us-news/forgotten-front-line-nursing-home-workers-say-they-face-retaliation-n1209606>.

<sup>9</sup> David Struett, "Nurse fired from Norwood Park senior home for pointing out COVID-19 safety issues: lawsuit," Chicago Sun-Times, May 26, 2020, <https://chicago.suntimes.com/news/2020/5/26/21270733/andrea-hinch-norwood-park-crossing-nursing-home-lawsuit-ppe-covid-19-coronavirus>

<sup>10</sup> Peter D'Auria, "Lawsuits accuse Jersey City nursing home of covering up COVID-19 cases, retaliating against whistleblowers," NJ.com, April 22, 2020, <https://www.nj.com/hudson/2020/04/lawsuits-accuse-jersey-city-nursing-home-of-covering-up-covid-19-cases-retaliating-against-whistleblowers.html>.

<sup>11</sup> Dan Noyes, "Coronavirus outbreak: East Bay nursing home whistleblower escorted off property by police, loses job," KGO ABC7 News, May 21, 2020, <https://abc7news.com/orinda-nursing-home-covid-19-care-center-outbreak-skilled-facility/6203014/>.

3. The Occupational Safety and Health Administration (OSHA) has issued only non-binding guidance for employers during the COVID-19 pandemic. OSHA has not issued an Emergency Temporary Standard (ETS) on infectious disease, or taken other steps to issue clear, science-based, and enforceable requirements for employers to follow during the pandemic.

a. What role would an ETS issued by OSHA play in protecting workers?

It has been NELP's steadfast position that OSHA should issue an ETS with clear requirements about what employers must do to protect workers during this pandemic. Unlike the "guidance" that OSHA and the Centers for Disease Control (CDC) have issued thus far, an ETS would have enforceable mandates that employers must follow. The guidance is voluntary, and employers can follow it if they choose, but they can also ignore it with impunity. With a standard, workers would have express mandates they could look to and demand accountability from their employers. Where employers failed to follow those mandates, workers could file complaints with OSHA and better expect an inspection with enforcement.

b. Can OSHA "sign off" on workplace safety standards issued by the states?

c. Would state-based workplace safety standards approved by the federal government be an adequate substitute for an OSHA ETS?

There are 21 States that have OSHA approved State Plan OSHA agencies, and those states can publish standards that offer more protection to workers and are approved by Federal OSHA. California OSHA, for example, has the only state standard to protect health care and emergency responders from Aerosol Transmissible Diseases—like COVID-19. It is a model standard but needs to be expanded to cover all other workers at risk.

d. What other steps should the federal government and employers take to protect workers, particularly as the economy reopens?

Employers must follow the CDC guidance on social distancing, providing masks, providing frequent access to hand washing and hand sanitizing, communicate to employees when there are cases in the workplace, provide better ventilation with more outside air, and deep clean when there is a case at work. CDC must be free to issue its findings and recommendations free of political interference and they cannot let industries dictate their guidance. CDC must publish guidance for all businesses with clear and mandatory directives and not use phrases like "consider this" or "if possible."

OSHA must issue an ETS that not only includes required safety precautions that all employers must implement, but also includes stepped up anti-retaliation provisions and provisions protecting workers who refuse unsafe work. OSHA must conduct on-site inspections in response to formal complaints—especially in COVID-19 hot spot industries such as meat packing, poultry, nursing homes, warehouses, and retail. OSHA must take whatever steps are necessary to get businesses into immediate compliance. OSHA must also aggressively protect workers who have been retaliated against for raising concerns about exposure to COVID -19 and must respond to these complaints immediately—as opposed to waiting two years. Finally, OSHA must immediately hire more staff in order to conduct the investigations that will be necessary to protect workers throughout the country.

**Full Committee Hearing: Examining Liability During the COVID-19 Pandemic**  
**Questions for the Record**  
**May 13, 2020**

**QUESTIONS FROM SENATOR SHELDON WHITEHOUSE**

Ms. Rebecca Dixon:

Cruise ship companies appear to have been particularly bad actors during the onset of COVID, continuing to operate when it was clear that they were floating incubators for the virus. Most of these cruise lines sail under foreign flags and are incorporated outside of the US to avoid regulation. Many cruise lines are now refusing to refund passengers' tickets for canceled cruises.

1. Why should we award cruise ships by giving them blanket immunity from lawsuits brought by injured Americans?

Senator Whitehouse, I'm afraid I cannot speak with too much specificity about cruise ships in particular, though I have certainly read the accounts of how much COVID-19 was spread on them. But I think this is the perfect example of why any sort of liability shield is a bad idea. Even after these ships became veritable "hot spots" for COVID, they still kept sailing, potentially exposing their crew, customers, and people in the ports they visited to the virus. They did this well after the time when the dangers with cruise ships were evident, not acting responsibly at all, and it is quite possible they acted with such impunity precisely because they were beyond the reach of U.S. laws and regulations that could have provided some measure of accountability. We cannot enact laws in the U.S. that would create incentives for businesses to act with anything other than the utmost responsibility and highest regard for worker and consumer safety.

**Rebecca Dixon**  
**Executive Director**  
**National Employment Law Project**  
**Questions for the Record**  
**Submitted May 19, 2020**

**QUESTIONS FROM SENATOR BOOKER**

1. We have seen the devastating toll the COVID-19 pandemic is taking on our nation, particularly on communities of color. African Americans comprise of only 13 percent of the total population in the United States, yet data from the Centers for Disease Control and Prevention revealed that 30 percent of COVID-19 patients are African American, and the mortality rate for African Americans is 2.6 times higher than the rate for whites. I am deeply concerned that broad grants of immunity will further harm minority communities, particularly essential workers who are on the front lines of this pandemic. More than 60 percent of warehouse and delivery workers in most cities are people of color, and where I live, in Newark, New Jersey, that number rises to more than 95 percent.

What do you believe would be the impact of broad liability protection on communities of color?

In America, opportunity and risk have always been segregated and stratified by race and gender. In fact, 87% of occupations in the US can be classified as racially segregated. Even when they have been race silent on their face, law and policy in this country has historically done a poor job of providing equal rights, benefits and protections to workers of color and immigrants. This thread runs through from the New Deal during the great depression through to this current economic crisis brought on by the pandemic. Though all workers on the job now, or returning in the next weeks and months, are at risk of illness, Black, Latinx, and other workers of color, including immigrants, are more likely to be in frontline jobs and along with Indigenous people, these communities have disproportionate rates of illness and death related to COVID-19.

The broad liability protections sought by the U.S. Chamber of Commerce would, in turn, disproportionately put Black, Latinx, and other workers of color, including immigrants in harm's way. Unscrupulous employers will interpret any such protections—however “narrow” their proponents claim them to be—as a green light to maximize profit, ignore OSHA and the CDC's voluntary guidance, and put their workers in harm's way. These unscrupulous employers are concentrated in sectors with workforces that disproportionately employ Black, Latinx, and other workers of color, including long-term-care, meatpacking, fast-food, and retail. Enacting such liability protections would create further disincentives for even law-abiding employers to protect their workers—producing a race-to-the-bottom for workplace standards—and cause a health and safety disaster, with new hot spots across sectors and spread across communities. Again, Black, Latinx, and other workers of color will be the most directly and negatively impacted by these policy choices, and rates of infection and death in communities of color will spiral.

2. The conditions present within large meat processing facilities are often times appalling. Workers at these factories are subject to unsafe conditions as animals are slaughtered and dismembered en masse. Public reporting has indicated that these workers, who are often immigrants, have been elbow to elbow breaking down pig carcasses without adequate personal protective equipment or proper decontamination protocols.

Can you explain why it is important for workers to be able to utilize the court system and hold employers accountable for subjecting them to dangerous conditions at work?

While workers already face extraordinary obstacles to holding their employers accountable for health and safety violations, they have brought some high-profile cases that have both brought important attention to workers' health and safety conditions and forced some of the worst actors to behave differently.

In one high-profile case, Smithfield Foods meat processing workers in Missouri sought not any monetary damages, but rather an injunction under the state's common-law public nuisance doctrine to get their employer to provide masks, ensure social distancing, give employees an opportunity to wash their hands while on the line, provide tissues, change its leave policy to discourage individuals to show up to work when they have symptoms, and give workers access to COVID-19 testing. They sued to enforce all the recommendations of the CDC and OSHA, but that neither agency will require or enforce. While the federal court dismissed that case at the outset, finding that OSHA was "better positioned to make these determinations,"<sup>1</sup> the mere fact that it was brought has resulted in Smithfield taking many actions to better protect its workers. For example, Smithfield posted signs noting that everyone was required to wear masks and supervisors were to enforce the policy; it added an additional tent area for lunchtime and modified its clocking in and out procedures to allow for social distancing; it reduced the number of hogs being slaughtered in order to rotate teams and increase social distancing; it reinforced previously flimsy plexiglass barriers between workers on the slaughter line and adjusted them to make sure that workers faces were covered; it began allowing workers to take paid sick leave upon showing symptoms of illness, rather than requiring them to wait for a diagnosis; and eliminated a policy that would deny "responsibility bonuses" to workers who took sick leave.<sup>2</sup>

In another important case, McDonald's workers in Illinois sought immediate injunctive relief in state court, alleging that four of the company's Chicago's restaurants were creating a public nuisance by forcing workers to work in close quarters with colleagues and customers, failing to provide sufficient PPE and hand sanitizer, forcing workers to reuse dirty masks or gloves, and silencing workers from speaking about colleagues who were infected or absent.<sup>3</sup>

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<sup>3</sup> Robert Channick, "Chicago McDonald's workers file class-action lawsuit alleging COVID-19 failures put employees and customers at risk," Chicago Tribune, May 19, 2020, <https://www.chicagotribune.com/coronavirus/ct-coronavirus-chicago-mcdonalds-lawsuit-workers-ppe-20200519-far75d4tuvfehnbnm2a4i4kzy-story.html>.

The workers asked the court to order McDonald's to supply adequate PPE and hand sanitizer, implement policies requiring all workers and customers to wear face coverings, train workers on precautions to prevent infection, and disclose to workers if a colleague is believed to be infected. While the workers' claims are still pending, their lawsuit has shined a bright spotlight on the chain's safety practices. And it now appears that McDonald's is moving to settle the workers' claims.<sup>4</sup>

3. We have witnessed the extraordinary bravery of so many people who make the daily sacrifice to remain on the front lines and work to keep our communities safe and running. From health care workers to grocery store employees, we are heavily relying on these brave women and men right now. According to a news reports, as recently as April, many essential workers at grocery stores, shipment fulfillment centers, and pharmacies complained that their employers were not providing them with sufficient gloves or masks to protect themselves. One survey found that only 40 percent of essential workers in the service sector were given masks, and only 50 percent had gloves. Meanwhile, the Occupational Safety and Health Administration has failed to issue any enforceable practices or policies that would protect workers.

Rather than closing off avenues of redress to these vital workers who are a lifeline in our communities, what should Congress be doing right now to ensure their safety during this pandemic?

Congress should be leading the charge to ensure that we get through this crisis with an eye toward helping those most impacted by the devastating consequences of COVID-19, and by giving responsible employers everywhere the tools they need to protect their workers and their customers. Broad grants of immunity for unsafe conditions won't just hurt workers—they will also further hinder any meaningful economic recovery because they will fail to stop the spread of disease and destroy consumer confidence to resume normal economic activity for fear of their own health and well-being.

Many public officials are rightfully praising the frontline workers who are doing work on which we all rely during this crisis. But to truly honor frontline workers, Congress must help ensure workers are safe from needless risk of infection, rather than giving irresponsible employers a pass to put workers in harm's way.

The most effective course of action is for OSHA to immediately issue *enforceable* standards that will protect workers from the grave danger posed by COVID-19; actively disseminate those standards to employers across the country; and vigorously hold corporations and employers accountable for implementing those standards.

OSHA has the power to issue an emergency temporary standard to protect workers from COVID-19 but has to date refused to do so.<sup>5</sup> Congress is fully empowered to require OSHA to issue such a

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<sup>4</sup> Celeste Bott, "McDonald's Aims to Settle Workers' COVID-19 Safety Suit," Law360, May 20, 2020, <https://www.law360.com/articles/1277614/mcdonald-s-aims-to-settle-workers-covid-19-safety-suit>.

<sup>5</sup> Vin Gurrieri, "DOL Chief Pours Cold Water On Possible Virus Safety Reg," Law360, May 26, 2020, <https://www.law360.com/employment/articles/1276814/dol-chief-pours-cold-water-on-possible-virus-safety-reg>

standard. The HEROES Act recently passed by the House of Representatives, which incorporates the provisions of H.R. 6559, the COVID-19 Every Worker Protection Act of 2020, would do just that. Instead of treating the health and safety of the nation's workers as a bargaining chip, the Senate should immediately take up and pass this critical legislation.

Our interconnectedness as a society has never been clearer. That means that, as ever, if we focus on helping the most vulnerable in our country weather these dangerous times, we will lift the conditions of everyone, and create the most vibrant nation and economy possible.