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# Employers and the Privatization of Public Health

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## Employers and the Privatization of Public Health

Sharona Hoffman<sup>†</sup>

*This Article focuses on the role of employers in public health and argues that they constitute increasingly important actors in the U.S. public health arena. In the aftermath of the COVID-19 pandemic, a series of judicial decisions and newly enacted statutes enfeebled the public health powers of the federal and state governments. In a 2023 statement, Supreme Court Justice Neil Gorsuch clearly articulated his antagonism towards government-initiated COVID-19 interventions, describing them as “the greatest intrusions on civil liberties in the peacetime history of this country.”<sup>1</sup> All too many share his views.*

*Employers may be highly motivated to safeguard their workers’ health. Without healthy staff members they cannot keep their doors open, and without visible pandemic protections they cannot reassure concerned customers that their premises are safe. During COVID-19, many employers established mask, testing, social distancing, and vaccine rules even in the absence of government mandates. Employers’ profit motives, however, do not diminish their contributions to public health. These contributions can significantly reduce health disparities by protecting vulnerable individuals who otherwise face health care access barriers and economic challenges that exacerbate their risks.*

*The Article posits that in future public health emergencies, the United States will increasingly rely on those with a financial stake in individuals’ health. Federal and state government authorities should therefore embrace employers as public health partners. To that end, the Article develops recommendations concerning guidance and funding support that should be available to assist employers in their emergency response efforts.*

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<sup>1</sup> Statement of Gorsuch, J., Arizona v. Alejandro Mayorkas, Secretary of Homeland Security, 598 U.S. \_\_\_\_ (2023).

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## INTRODUCTION

In an era in which the courts and the public are increasingly hostile to government health regulations,<sup>2</sup> employers have emerged as essential public health actors. Indeed, employers already make vital contributions to the health of the American workforce, and in the future, greater responsibility will likely fall on their shoulders.<sup>3</sup> This Article shines a spotlight on employers and argues that they must be recognized and supported as important partners in the public health arena.

Traditionally, state governments have had primary responsibility for public health pursuant to their police powers.<sup>4</sup> But COVID-19 measures generated unprecedented resistance to state interventions, as evidenced by the plot to kidnap Michigan Governor Gretchen Whitmer<sup>5</sup> and protests in front of the home of Ohio Department of Health Director, Dr. Amy Acton, that led to her resignation.<sup>6</sup> Moreover, in the wake of COVID-19, some states significantly diminished the powers of their governors and departments of health in public health emergencies through new

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<sup>2</sup> See Lawrence O. Gostin & Sarah Wetter, *The Supreme Court Is Harming Public Health and the Environment*, 329 JAMA 1549, 1550 (2023) (“The Supreme Court’s 6 conservative justices are bringing vast changes to the public health legal landscape”); Dror Walter, Yotam Ophir & Hui Ye, *Conspiracies, Misinformation and Resistance to Public Health Measures During COVID-19 in White Nationalist Online Communication*, 41 VACCINE 2868, 2868 (2023) (“Resistance to public health measures, such as lockdowns, masking and vaccines was particularly strong among conservatives and Republicans”).

<sup>3</sup> See *infra* Parts III & IV.

<sup>4</sup> See, e.g., *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991) (plurality opinion) (“The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals”).

<sup>5</sup> Mitch Smith, *Man Sentenced to 16 Years in Prison for Plotting to Kidnap Michigan’s Governor*, N.Y. TIMES (Dec. 27, 2022), <https://www.nytimes.com/2022/12/27/us/michigan-whitmer-governor-kidnapping-sentencing.html>.

<sup>6</sup> Randy Ludlow, *Ohio Health Director Amy Acton Unexpectedly Resigns Amid Coronavirus Pandemic*, USA TODAY (June 11, 2020, 4:00 PM) <https://www.usatoday.com/story/news/nation/2020/06/11/amy-acton-ohio-health-director-resigns-amid-coronavirus-pandemic/5345010002/>.

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legislation.<sup>7</sup> No state attempted to establish a generally applicable vaccine mandate.<sup>8</sup>

Likewise, federal courts blocked state and federal efforts to implement and maintain COVID-19 interventions.<sup>9</sup> Most notably, in January 2022 the Supreme Court stayed the Occupational Safety and Health Administration's November 2021 mandate that employers with one-hundred or more employees require workers to be vaccinated or to wear masks and be tested weekly.<sup>10</sup> Later that same year a federal district court judge in Florida struck down the mask requirement for airplanes and other forms of public transportation.<sup>11</sup> President Biden's 2021 executive order establishing a vaccine mandate for federal employees<sup>12</sup> met a similar fate at the hands of a Texas district judge and the Fifth Circuit Court of Appeals.<sup>13</sup>

In light of these legislative and judicial developments, employers were often left on their own to establish protocols to protect the health and

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<sup>7</sup> *Proposed Limits on Public Health Authority: Dangerous for Public Health*, THE NETWORK FOR PUB. HEALTH L. & NAT'L ASS'N OF CNTY. & CITY HEALTH OFFS. (May 2021), <https://www.networkforphl.org/wp-content/uploads/2021/05/Proposed-Limits-on-Public-Health-Authority-Dangerous-for-Public-Health-FINAL.pdf>, [hereinafter *Proposed Limits*].

<sup>8</sup> MaryBeth Musumeci & Jennifer Kates, *Key Questions About COVID-19 Vaccine Mandates*, KFF (Apr. 7, 2021), <https://www.kff.org/coronavirus-covid-19/issue-brief/key-questions-about-covid-19-vaccine-mandates/> ("states [generally] do not use mandates for adult vaccination and have thus far said they are not mandating COVID-19 vaccination"); *State Efforts to Ban or Enforce COVID-19 Vaccine Mandates and Passports*, NAT'L ACAD. FOR STATE HEALTH POL'Y, <https://nashp.org/state-efforts-to-ban-or-enforce-covid-19-vaccine-mandates-and-passports/> (updated May 8, 2023).

<sup>9</sup> See Amanda L. Tyler, *Judicial Review in Times of Emergency: From The Founding Through The Covid-19 Pandemic*, 109 VA. L. REV. 489, 524-54 (2023); *National Federation of Independent Business v. Department of Labor and Ohio v. Department of Labor*, THE NETWORK FOR PUB. HEALTH L., <https://www.networkforphl.org/national-federation-of-independent-business-v-department-of-labor-and-ohio-v-department-of-labor/> (last updated Nov. 4, 2022).

<sup>10</sup> Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661, 661 (2022).

<sup>11</sup> *Health Freedom Def. Fund v. Biden*, 599 F. Supp. 3d 1144 (M.D. Fla. 2022). The Biden administration issued a vaccine mandate for federal contractors that it abandoned in October 2022 after the mandate was rejected by three circuit courts, though the Ninth Circuit later deemed it lawful. Daniel Wiessner, *Biden's COVID Vaccine Rule for Federal Contractors Was Valid*, US COURT RULES, REUTERS (Apr. 19, 2023, 2:52 PM), <https://www.reuters.com/legal/bidens-covid-vaccine-rule-federal-contractors-was-valid-us-court-rules-2023-04-19/>. The Supreme Court, however, upheld a vaccine mandate for staff members of healthcare facilities participating in Medicare and Medicaid in *Biden v. Missouri*, 142 S. Ct. 647, 647 (2022). See *infra* note 85 and accompanying text.

<sup>12</sup> Exec. Order No. 14043, 84 Fed. Reg. 50989 (Sept. 9, 2021), <https://www.federalregister.gov/documents/2021/09/14/2021-19927/requiring-coronavirus-disease-2019-vaccination-for-federal-employees>.

<sup>13</sup> *Feds for Med. Freedom v. Biden*, 581 F. Supp. 3d 826, 826 (S.D. Tex. 2022); *Feds for Med. Freedom v. Biden*, 63 F.4th 366, 366 (5th Cir. 2023).

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welfare of their workforces and customers.<sup>14</sup> Many did so by establishing remote work policies, masking and testing requirements, and ultimately vaccine mandates.<sup>15</sup> This Article posits that employers are underappreciated as public health actors. Even before the pandemic, employers played an outsized role in the health arena, providing health insurance to approximately half of the American population and offering wellness and employee assistance programs to their workers.<sup>16</sup>

Admittedly, employers do not necessarily act out of altruistic motives. To remain profitable, employers must ensure that their employees can perform their job tasks and that customers do not fear that they will become sick if they visit the premises.<sup>17</sup> But because they have a financial stake in the health of workers and customers, they are a sensible alternative to government authorities when the latter's ability to intervene effectively is constrained. Consequently, we may be experiencing the privatization of public health, with responsibility devolving to parties that have financial interests at heart. Employers' profit motives, however, do not diminish their contributions to public health. In fact, employers' disaster response measures can reduce health disparities by protecting vulnerable individuals who otherwise face health care access barriers and economic challenges that exacerbate their risks.<sup>18</sup>

This Article focuses primarily on public health emergencies. The COVID-19 pandemic was not an unprecedented occurrence, and many experts predict other pandemics in the foreseeable future.<sup>19</sup> In such instances, employers may well fill the voids left by federal, state, and local governments. They thus should be appreciated as an important component of the United States' public health infrastructure and should be offered support and guidance to fulfill their role. Although government entities may face significant obstacles when attempting to impose large-scale pandemic mandates on their own, they can use their taxing and spending powers to encourage and support employers' response activities.<sup>20</sup>

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<sup>14</sup> Deborah Berkowitz, *Worker Safety & Health during COVID-19 Pandemic: Rights & Resources*, NAT'L EMP. L. PROJECT (Apr. 9, 2020), <https://www.nelp.org/publication/worker-safety-health-during-covid-19-pandemic-rights-resources/>.

<sup>15</sup> See *infra* Part IV.A.

<sup>16</sup> See *infra* Part III.

<sup>17</sup> See *infra* Part III.A.

<sup>18</sup> See *infra* Part VII.A.3.

<sup>19</sup> David Heymann, Emma Ross & Jon Wallace, *The Next Pandemic – When Could It Be?*, CHATHAM HOUSE (Feb. 23, 2022), <https://www.chathamhouse.org/2022/02/next-pandemic-when-could-it-be>.

<sup>20</sup> See *infra* Parts I.A., II.A.

This is not to say that employers should replace public health authorities or eliminate the need for them.<sup>21</sup> Employers are unlikely to act in the best interest of communities or even of employees if their financial interests do not align with doing so.<sup>22</sup> In addition, while public health agencies have considerable expertise and a commitment to safeguarding Americans' health and welfare, employers face little scrutiny or accountability for the quality of the health measures they implement.<sup>23</sup> Consequently, the paper argues for a partnership between employers and government authorities rather than a binary choice between them.

The remainder of the Article proceeds as follows. Part I analyzes the traditional role of the federal, state, and local governments in public health. Part II assesses the constraints under which federal and state public health authorities must now operate. Part III transitions to an analysis of the traditional role of employers in promoting health in the workplace, including through health insurance, wellness programs, and employee assistance programs. This part also argues that employers may be highly motivated to promote the health of their workforces. Part IV examines the growing public health role of employers in the wake of the COVID-19 pandemic and the *Dobbs v. Jackson Women's Health Organization*<sup>24</sup> decision that eliminated the constitutional right to abortion. Part V evaluates federal and state laws that may affect employers' workplace health measures by either facilitating or limiting them. These include the Americans with Disabilities Act, Title VII of the Civil Rights Act, and a variety of state laws. Part VI acknowledges several concerns that are raised by employers' assumption of responsibility for emergency response activities. Part VII formulates recommendations. It posits that federal and state governments should embrace employers as public health partners, provide them with suitable and accessible guidance, and support their emergency response activities through funding and tax credit initiatives. Part VIII concludes.

### I. TRADITIONAL ROLE OF GOVERNMENT IN PUBLIC HEALTH

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<sup>21</sup> See *infra* Part VI.

<sup>22</sup> See *infra* notes 296-302 and accompanying text.

<sup>23</sup> See *Kuciemba v. Victory Woodworks*, 14 Cal.5<sup>th</sup> 993, 1033 (2023) ("An employer does not owe a duty of care under California law to prevent the spread of COVID-19 to employees' household members"); Shantanu Nundy, Lisa A. Cooper & Ellen Kelsay, *Employers Can Do More to Advance Health Equity*, HARVARD BUS. REV. (Jan-Feb. 2023), <https://hbr.org/2023/01/employers-can-do-more-to-advance-health-equity>.

<sup>24</sup> 142 S. Ct. 2228 (2022).

The federal and state governments have historically played critical roles in the public health arena. Federal government authority is rooted in its powers to tax, spend, and regulate interstate commerce. The states act under their police powers. This Part examines the governments' traditional public health functions.

### A. Federal Government

The federal government has traditionally been empowered to play a key role in the public health realm because of its authority to tax, spend government funds, and regulate interstate commerce.<sup>25</sup> The power to tax and spend is established in Article I, section 8 of the Constitution: “Congress shall have power to lay and collect taxes... and provide for the common Defence and general Welfare of the United States.”<sup>26</sup> The same section bestows upon Congress the power to “regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes.”<sup>27</sup>

Through tax policies, the federal government can discourage hazardous behavior and reward health-promoting conduct.<sup>28</sup> To illustrate, there is currently a federal cigarette tax of \$1.01 per pack that could potentially deter some purchases.<sup>29</sup> At the same time, the incentive of the Architectural Barrier Removal Tax Deduction is designed to encourage businesses to remove architectural barriers that impede access for people with disabilities and the elderly.<sup>30</sup>

The spending power enables Congress to allocate resources and to require states to comply with particular conditions in order to receive federal funds.<sup>31</sup> Thus, in order to participate in Medicaid, states must cover designated categories of low-income people, such as children, pregnant

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<sup>25</sup> LAWRENCE O. GOSTIN & LINDSAY F. WILEY, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT 94 (3d ed. 2016).

<sup>26</sup> U.S. CONST. art. I, § 8.

<sup>27</sup> *Id.*

<sup>28</sup> GOSTIN & WILEY, *supra* note 25, at 100.

<sup>29</sup> *Cigarette & Tobacco Taxes*, AM. LUNG ASS’N, <https://www.lung.org/policy-advocacy/tobacco/tobacco-taxes> (last updated Nov. 17, 2022).

<sup>30</sup> *Tax Benefits for Businesses Who Have Employees with Disabilities*, IRS, <https://www.irs.gov/businesses/small-businesses-self-employed/tax-benefits-for-businesses-who-have-employees-with-disabilities> (last reviewed or updated June 13, 2022).

<sup>31</sup> *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (explaining that the conditions must be clearly articulated in the statute). In addition, a reasonable relationship must exist between the imposed conditions and the program’s objectives. *South Dakota v. Dole*, 483 U.S. 203, 207-08 (1987). Finally, Congressional funding offers may not be so coercive that they compel acceptance of conditions. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 580 (2012).

people, parents, and individuals receiving Supplemental Security Income.<sup>32</sup> Likewise, parties receiving Coronavirus State and Local Fiscal Recovery Funds could use the money only for specified purposes and had to comply with a variety of requirements.<sup>33</sup>

The Supreme Court has generally deemed interstate commerce to be quite broad and determined that Congress has liberal powers to regulate it.<sup>34</sup> In *Gonzales v. Raich*, the Court stated that Congress may “regulate purely local activities that are part of an economic ‘class of activities’ that have a substantial effect on interstate commerce.”<sup>35</sup> The Constitution also grants Congress the power “[t]o make all Laws which shall be necessary and proper” for carrying out its enumerated powers.<sup>36</sup> This power extends to the creation of federal agencies.<sup>37</sup>

The federal government has an expansive presence in the public health arena.<sup>38</sup> It regulates health-related matters through a variety of agencies, including the Department of Agriculture, the Environmental Protection Agency, the Department of Labor, the Social Security Administration, the Federal Emergency Management Agency, and, most importantly, the Department of Health and Human Services and its many subparts, such as the Food and Drug Administration, the Centers for Disease Control and Prevention, and others.<sup>39</sup>

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<sup>32</sup> *Policy Basics: Introduction to Medicaid*, CTR. ON BUDGET & POL’Y PRIORITIES, <https://www.cbpp.org/research/health/introduction-to-medicaid> (updated Apr. 14, 2020); *Medicaid Eligibility*, MEDICAID.GOV, <https://www.medicaid.gov/medicaid/eligibility/index.html> (last visited Jan. 15, 2024).

<sup>33</sup> *Coronavirus State and Local Fiscal Recovery Funds*, U.S. DEP’T OF TREASURY, <https://home.treasury.gov/policy-issues/coronavirus/assistance-for-state-local-and-tribal-governments/state-and-local-fiscal-recovery-funds> (last visited Jan. 15, 2024) (indicating that recipients could use funds to 1) “[r]eplace lost public sector revenue,” 2) “[r]espond to the far-reaching public health and negative economic impacts of the pandemic,” 3) “[p]rovide premium pay for essential workers,” and 4) “[i]nvest in water, sewer, and broadband infrastructure”); *Coronavirus State & Local Fiscal Recovery Funds: 2022 Overview of the Final Rule*, U.S. DEP’T OF TREASURY (Jan. 2022), <https://home.treasury.gov/system/files/136/SLFRF-Final-Rule-Overview.pdf>.

<sup>34</sup> GOSTIN & WILEY, *supra* note 25, at 94-5.

<sup>35</sup> *Gonzales v. Raich*, 545 U.S. 1, 17 (2005) (allowing application of the Controlled Substances Act to local marijuana production). *But see Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 551 (emphasizing that as broad as the commerce power is, it is limited to commercial activity); *Infra* Part II.A (discussing diminishing federal regulatory powers).

<sup>36</sup> U.S. CONST. art. I, § 8.

<sup>37</sup> Jack M. Beermann, *Seila Law: Is There a There There?*, 8/27/2020 U. CHI. L. REV. ONLINE 87, 88 (2020).

<sup>38</sup> GOSTIN & WILEY, *supra* note 25, at 93.

<sup>39</sup> *Id.* at 168-69; LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT 42-45 (1st ed. 2000).

## B. State Governments

Although the federal government has been very active in the public health realm, primary responsibility for public health is reserved for the states.<sup>40</sup> Under the Constitution's Tenth Amendment, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."<sup>41</sup> The Supreme Court has ruled that these powers include state police powers, defined as "the authority to provide for the public health, safety, and morals."<sup>42</sup> States may delegate police powers to local governments such as county and city governments.<sup>43</sup>

Pursuant to their police powers, states have traditionally been authorized to require vaccination, quarantine and isolation, inspection of premises, abatement of health hazards, pest and insect extermination, water fluoridization, licensure of health care providers, and more.<sup>44</sup> Unfortunately, the states have also used police powers to take actions that are repugnant, such as involuntarily sterilizing tens of thousands of individuals deemed to be "mental defectives."<sup>45</sup> State police powers are restricted only by federal and state constitutional constraints, such as the principles of due process and equal protection.<sup>46</sup>

All states have statutes that enable governors to declare disaster and public health emergencies.<sup>47</sup> Emergency declarations enable governors to modify state statutory and regulatory rules temporarily for purposes of emergency response.<sup>48</sup> They also delineate the limits of executive power in emergencies.<sup>49</sup>

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<sup>40</sup> *Gibbons v. Ogden*, 22 U.S. 1, 2 (1824) ("health laws ... are not within the power granted to Congress"); GOSTIN & WILEY, *supra* note 25, at 87.

<sup>41</sup> U.S. CONST. amend. X.

<sup>42</sup> *Barnes v. Glen Theatre, Inc.*, 501 U.S. at 569.

<sup>43</sup> GOSTIN & WILEY, *supra* note 25, at 178.

<sup>44</sup> *Id.* at 90.

<sup>45</sup> See *Buck v. Bell*, 274 U.S. 200, 205-207 (1927) (finding that Virginia's sterilization law was constitutional and did not violate the Fourteenth Amendment); Alexandra Stern, *Forced Sterilization Policies in the US Targeted Minorities and Those with Disabilities – and Lasted into the 21st Century*, U. MICH. INST. FOR HEALTHCARE POL'Y & INNOVATION (Sept. 23, 2020), <https://ihpi.umich.edu/news/forced-sterilization-policies-us-targeted-minorities-and-those-disabilities-and-last-21st>.

<sup>46</sup> U.S. CONST. amend. XIV, § 1; Randy E. Barnett, *The Proper Scope of the Police Power*, 79 NOTRE DAME L. REV. 429, 430 & 434 (2004).

<sup>47</sup> *Governors Powers and Authority*, NAT'L GOVERNORS ASS'N, <https://www.nga.org/governors/powers-and-authority/> (last visited Jan. 16, 2024).

<sup>48</sup> *Id.*

<sup>49</sup> See *infra* Part II.B.

### C. Local Governments

While the federal Constitution does not mention local governments, all states have constitutional or statutory provisions that delegate power to local governments.<sup>50</sup> Self-governance or limited autonomy on the county and municipal levels is known as “home rule.”<sup>51</sup> Among the powers that local governments often have is the authority to institute emergency response measures, as specified by state law.<sup>52</sup>

## II. THE CHANGING FEDERAL AND STATE REGULATORY LANDSCAPE

In response to measures implemented by federal, state, and local governments to address the COVID-19 pandemic, individuals filed a multitude of legal challenges that resulted in over 1000 judicial opinions.<sup>53</sup> Courts denied plaintiffs the relief they sought in over three-quarters of these cases.<sup>54</sup> Nevertheless, this litigation surge resulted in an erosion of government officials’ powers as many decisions deviated from the traditional approach of deference to scientific experts in the executive branch.<sup>55</sup> This trend has raised alarms among many public health advocates.<sup>56</sup>

### A. Diminished Federal Public Health Powers

For the better part of three decades, the Supreme Court has steadily eroded the federal government’s authority to act in the public health realm.<sup>57</sup> For example, in the 1995 case of *United States v. Lopez*, the

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<sup>50</sup> Nat’l League of Cities, *Principles of Home Rule for the 21st Century* (2020), as reprinted in 100 N.C. L. REV. 1329, 1330 (2022).

<sup>51</sup> *Id.* at 1334-35.

<sup>52</sup> See *infra* notes 103-110 and accompanying text.

<sup>53</sup> Wendy E. Parmet & Faith Khalik, *Judicial Review of Public Health Powers Since the Start of the COVID-19 Pandemic: Trends and Implications*, 113 AM. J. PUB. HEALTH 280, 280 (2023) (finding that plaintiffs were most successful “in cases involving religious liberty or scope of authority”).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 280, 285; Lawrence O. Gostin, Dorit Reiss & Michelle M. Mello, *Vaccination Mandates – An Old Public Health Tool Faces New Challenges*, 330 JAMA 589, 589-90 (2023); Michelle Mello & Wendy Parmet, *U.S. Public Health Law – Foundations and Emerging Shifts*, 386 NEW ENG. J. MED. 805, 808 (2022).

<sup>56</sup> Lawrence O. Gostin, *Judicial Trends in the Era of COVID-19: Public Health in Peril*, 113 AM. J. PUB. HEALTH 272, 272 (2023); Parmet & Khalik, *supra* note 53, at 280.

<sup>57</sup> GOSTIN & WILEY, *supra* note 25, at 97. Wendy E. Parmet, *Fights between U.S. States and the National Government Are Endangering Public Health*, SCI. AM. (Oct. 19, 2022),

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Supreme Court held that Congress exceeded its Commerce Clause powers when it rendered gun possession within a school zone a federal crime because such gun possession did not substantially affect interstate commerce.<sup>58</sup> In 2000, in *United States v. Morrison*, the Court invalidated the private civil remedy in the Violence Against Women Act.<sup>59</sup> It asserted that such violence was not an activity that substantially affected interstate commerce despite congressional findings that violence impedes women's ability to work, hurts businesses, and raises national health care costs.<sup>60</sup> The Court stated that Congress "may not regulate noneconomic, violent criminal conduct based solely on the conduct's aggregate effect on interstate commerce."<sup>61</sup>

The Supreme Court has also relied on the anti-commandeering principle to invalidate federal law.<sup>62</sup> This principle holds that the federal government cannot force states to carry out federal programs.<sup>63</sup> For example, in the 1997 case of *Printz v. United States* the Court ruled that Congress could not require state and local officials to perform background checks on gun purchasers under the Brady Handgun Violence Prevention Act.<sup>64</sup>

In the landmark 2012 case of *National Federation of Independent Business v. Sebelius*, the Supreme Court prohibited the Secretary of Health and Human Services (HHS) from withdrawing existing Medicaid funds from states that refused to expand Medicare as required by the Affordable Care Act (ACA).<sup>65</sup> The Court held that the ACA provision that permitted the Secretary to do so exceeded Congress' spending power because it was excessively coercive, forcing states to choose between expanding Medicaid and the extreme consequence of losing all Medicaid funding.<sup>66</sup> Thus, for the first time, the Court struck down a federal government spending condition as unconstitutional.<sup>67</sup> In the same case, the Court also continued to read the Commerce Clause narrowly and ruled that the

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<https://www.scientificamerican.com/article/fights-between-u-s-states-and-the-national-government-are-endangering-public-health/>.

<sup>58</sup> *United States v. Lopez*, 514 U.S. 549, 549 (1995).

<sup>59</sup> *United States v. Morrison*, 529 U.S. 598, 598 (2000).

<sup>60</sup> *Id.* at 599 & 631-32.

<sup>61</sup> *Id.* at 599.

<sup>62</sup> Charlotte S. Butash, *The Anti-Commandeering Doctrine in Civil Rights Litigation*, 55 HARV. C.R.-C.L.L. REV. 681, 682 (2020).

<sup>63</sup> *Id.*

<sup>64</sup> *Printz v. United States*, 521 U.S. 898, 935 (1997). *See also*, *New York v. United States*, 505 U.S. 144 (1992) (holding that the Low-Level Radioactive Waste Policy Act's "take title" provision, requiring states to accept ownership of waste or regulate according to instructions of Congress, lies outside Congress' enumerated powers").

<sup>65</sup> *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 519 (2012).

<sup>66</sup> *Id.* at 585-86.

<sup>67</sup> GOSTIN & WILEY, *supra* note 25, at 103.

provision did not empower Congress to compel Americans to buy health insurance.<sup>68</sup> However, it upheld the penalty that the ACA imposed on people without health insurance as a tax that fell within Congress' taxing power.<sup>69</sup>

During the COVID-19 pandemic, the Supreme Court further limited the federal government's public health power by reading federal statutes more narrowly than the government proposed and invalidating several federal agency interventions. In *Alabama Ass'n of Realtors v. Dept. of Health and Human Services*,<sup>70</sup> the Court lifted a stay on a lower court's judgment that struck down the Centers for Disease Control and Prevention's (CDC) nationwide moratorium on evictions of financially challenged tenants living in counties with substantial or high levels of COVID-19 transmission.<sup>71</sup> The Court held that it "strains credulity" to read the statute on which the CDC relied,<sup>72</sup> 42 U.S.C. § 264(a), as giving the CDC such sweeping authority.<sup>73</sup> The statute had previously been applied to much more limited actions such as quarantines of infected patients and prohibitions on the import or sale of animals known to carry diseases.<sup>74</sup>

In its most well-known pandemic case, *National Federation of Independent Business v. Department of Labor, Occupational Safety and Health Administration*, the Court granted applications to stay the Occupational Safety & Health Administration's (OSHA) vaccine rule.<sup>75</sup> OSHA had mandated that employers with one-hundred or more employees require covered workers to receive COVID-19 vaccines or to wear masks and undergo weekly testing at their own expense.<sup>76</sup> The Court ruled that the Occupational Safety and Health Act authorized OSHA to regulate only workplace-specific hazards and not to establish "broad public health measures."<sup>77</sup> In their concurrence, Justices Gorsuch, Thomas, and Alito referred to the "major questions doctrine," which posits that Congress must clearly articulate any wish "to assign to an executive agency decisions 'of vast economic and political significance.'"<sup>78</sup>

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<sup>68</sup> *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 552.

<sup>69</sup> *Id.* at 570.

<sup>70</sup> 141 S. Ct. 2485 (2021).

<sup>71</sup> *Alabama Ass'n of Realtors*, 141 S. Ct. at 2485-86.

<sup>72</sup> 42 U.S.C. § 264(a).

<sup>73</sup> *Alabama Ass'n of Realtors*, 141 S. Ct. at 2486.

<sup>74</sup> *Id.* at 2487.

<sup>75</sup> *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab.*, 142 S. Ct. 661, 661 (2022).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 665.

<sup>78</sup> *Id.* at 667. See also, Kate R. Bowers, *The Major Questions Doctrine*, CONG. RSCH. SERV., <https://crsreports.congress.gov/product/pdf/IF/IF12077> (updated Nov. 2, 2022).

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Note that by contrast, in a companion case, *Biden v. Missouri*, the Supreme Court held that the Secretary of Health and Human Services was statutorily authorized to require staff members of healthcare facilities participating in Medicare and Medicaid to receive COVID-19 vaccinations.<sup>79</sup> The Court reasoned that Congress empowered the Secretary to place conditions on the receipt of Medicaid and Medicare funding for the purpose of protecting the health and safety of individuals obtaining health care services.<sup>80</sup> Because COVID-19 was dangerous and contagious, the health care worker vaccine mandate was an acceptable condition.<sup>81</sup>

In April of 2022, a Florida district court judge, Kathryn Kimball Mizelle, famously struck down the CDC's airplane and public transportation mask mandate.<sup>82</sup> She relied in part on the major questions doctrine, ruling that the Public Health Service Act contained no clear language "indicating that Congress intended for the CDC to invade the traditionally State-operated arena of population-wide, preventative public-health regulations."<sup>83</sup>

Based on the major questions doctrine, several courts likewise ruled against President Biden's executive order requiring federal contractors to ensure that their employees were fully vaccinated.<sup>84</sup> The Fourth, Fifth, and Sixth Circuits upheld lower courts' preliminary injunctions, finding that Congress had not clearly authorized the President's action in the Procurement Act.<sup>85</sup>

That same year, the Supreme Court decided a landmark case about an Environmental Protection Agency (EPA) regulation that the EPA itself had already abandoned.<sup>86</sup> The Court deemed the agency's Clean Power

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<sup>79</sup> *Biden v. Missouri*, 142 S. Ct. 647, 647 (2022).

<sup>80</sup> *Id.* at 652.

<sup>81</sup> *Id.*

<sup>82</sup> *Health Freedom Def. Fund, Inc. v. Biden*, 599 F. Supp. 3d 1144, 1144 (M.D. Fla. 2022).

<sup>83</sup> *Id.* at 1166. The Justice Department appealed this decision, and in June of 2023 the Eleventh Circuit Court of Appeals ordered that the district court's judgment be vacated and the case be dismissed as moot because the COVID-19 public health emergency had ended. *Health Freedom Def. Fund v. President of the United States*, 71 F.4th 888 (11th Cir. 2023).

<sup>84</sup> Wiessner, *supra* note 11.

<sup>85</sup> *Georgia v. President of the United States*, 46 F.4th 1283, 1295 & 1313 (4th Cir. 2022); *Louisiana v. Biden*, 55 F.4th 1017, 1029 & 1033 (5th Cir. 2022); *Kentucky v. Biden*, 23 F.4th 585, 607 (6th Cir. 2022). *But see Mayes v. Biden*, 67 F.4th 921, 932-34 (9th Cir. 2023) (reversing a permanent injunction and finding that the President's federal contractor mandate fell within the scope of the Procurement Act and thus the major questions doctrine did not apply and was not violated).

<sup>86</sup> *West Virginia v. Env't Prot. Agency*, 142 S. Ct. 2587, 2593 (2022). *See generally*, Jonathan H. Adler, *West Virginia v. EPA: Some Answers about Major Questions*, CATO S. CT. REV. 37 (2022), <https://www.cato.org/sites/cato.org/files/2022-09/Supreme>

Plan rule to be statutorily precluded.<sup>87</sup> For the first time, a majority explicitly relied on the major questions doctrine, invalidating the rule because the Clean Air Act did not plainly authorize the EPA to formulate emissions caps based on the “generation shifting” approach the Agency adopted in the Clean Power Plan.<sup>88</sup>

Liberal commentators and policy makers have greeted the major questions doctrine with concern and hostility.<sup>89</sup> They assert that Congress cannot realistically provide specific instructions to regulatory agencies because it lacks the expertise to do so.<sup>90</sup> For this very reason, it delegates regulatory powers to agencies that are staffed by subject-matter experts.<sup>91</sup> Moreover, Congress cannot anticipate changing circumstances and needs over time, and thus it would be imprudent for the legislature to adopt narrow statutory language that would deprive agencies of flexibility.<sup>92</sup> Critics argue that the major questions doctrine and the Supreme Court’s apparent eagerness to restrict federal agency powers may shackle the federal government as it faces public health challenges in the future.<sup>93</sup>

### **B. Diminished State and Local Regulatory Powers**

During the COVID-19 pandemic, litigation outcomes regarding state regulatory efforts were mixed. Many decisions upheld state police powers

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Court-Review-2022-Chapter-2.pdf; Michael Gerrard, Joanne Spalding, Jill Tauber & Keith Matthews, *West Virginia v. Environmental Protection Agency: The Agency’s Climate Authority*, 52 ENVTL. L. REP. (Envlt. Law Inst.) 10,429 (June 2022).

<sup>87</sup> *West Virginia*, 142 S. Ct. at 2587. The rule was designed to address carbon dioxide emissions from existing power plants powered by coal and natural gas. *Id.* at 2592.

<sup>88</sup> *Id.* at 2595. Generation shifting is a “shift in electricity production from higher-emitting to lower-emitting producers.” *Id.* at 2593.

<sup>89</sup> See e.g., Natasha Brunsteina & Richard L. Revesz, *Mangling the Major Questions Doctrine*, 74 ADMIN. L. REV. 217, 262 (2022) (arguing that the “Trump Administration used the major questions doctrine, in a manner wholly unsupported by Supreme Court precedent, to launch a broadside attack on the administrative state in general and on climate change regulation in particular”); Nathan Richardson, *Antideference: COVID, Climate, and the Rise of the Major Questions Canon*, 108 VA. L. REV. ONLINE 174, 174 (2022) (asserting that the major questions doctrine “threatens to cripple the administrative state, particularly in emergencies and in areas of evolving science, such as pandemics and climate change”); Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 318 (2022) (asserting that by adopting the major questions doctrine the Court intends to “curtail, the power and the promise of the regulatory state”).

<sup>90</sup> *West Virginia*, 142 S. Ct. at 2642 (Kagan, E. dissenting).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 2641 (“Today, one of those broader goals makes itself clear: Prevent agencies from doing important work, even though that is what Congress directed.”); Cary Coglianese, *Pandemic Federalism*, 68 WAYNE L. REV. 1, 26-29 (discussing the need for national authority and coordination in response to major crises such as pandemics and climate change); Gostin, *supra* note 56, at 272; Parmet & Khalik, *supra* note 53, at 280; Richardson, *supra* note 89, at 174; Sohoni, *supra* note 89, at 318.

and rejected plaintiffs' constitutional challenges to state-issued pandemic policies. Courts upheld mask and vaccine mandates that were instituted by state and local government entities as well as restrictions on restaurant dining and religious worship.<sup>94</sup> Other courts, however, were more antagonistic to state regulatory efforts. Most notably, in *Roman Catholic Diocese of Brooklyn v. Cuomo* the U.S. Supreme Court enjoined enforcement of Governor Cuomo's ten- and twenty-five-person occupancy limits for places of worship on First Amendment grounds.<sup>95</sup> A few lower courts ruled against state-ordered mask and vaccine mandates, finding that they were improperly enacted or arbitrary and capricious.<sup>96</sup>

At the same time, many states themselves opted to curtail local and state public health powers, as detailed below.<sup>97</sup> Some passed broad laws

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<sup>94</sup> See *Lloyd v. Sch. Bd. of Palm Beach Cnty.*, 570 F. Supp. 3d 1165, 1165 (S.D. Fla. 2021) (dismissing challenge to school mask mandate); *Megeso-William-Alan v. Ige*, 538 F. Supp. 3d 1063, 1063 (D. Haw. 2021) (dismissing challenge to Hawaii's mask mandate); *Bush v. Fantasia*, 2022 WL 4134501 (D. Mass. 2022) (dismissing challenge to the constitutionality of mask mandates instituted by local board of health and public library); *Doe v. Franklin Square Union Free Sch. Dist.*, 568 F. Supp. 3d 270, 270 (E.D.N.Y. 2021) (denying motion for preliminary injunction to prohibit enforcement of school mask mandate); *Health Freedom Def. Fund, Inc., v. City of Hailey*, 590 F. Supp. 3d 1253, 1253 (D. Idaho 2022) (denying motion for preliminary injunction to prohibit enforcement of city's mask mandate); *Oberheim v. Bason*, 565 F. Supp. 3d 607, 607 (M.D. Pa. 2021) (denying motion for preliminary and permanent injunction seeking to enjoin school mask mandate); *UnifySCC v. Cody*, 2022 WL 686310 (N.D. Cal. 2022) (denying motion for temporary restraining order relating to Santa Clara County's vaccine mandate for certain employees); *We the Patriots USA, Inc. v. Hochul*, 17 F.4th 266 (2nd Cir. 2021) (holding that plaintiffs were not entitled to preliminary injunction to prohibit enforcement of New York's healthcare workers vaccine mandate); *Matter of City of Newark*, 469 N.J. Super. 366, 366 (2021) (holding that "city had authority, as an exercise of its managerial prerogative, to issue COVID-19 vaccination mandate to its employees"); *Hopkins Hawley LLC v. Cuomo*, 518 F. Supp. 3d 705, 705 (S.D.N.Y. 2021) (denying preliminary injunction motion regarding Governor Cuomo's dining restrictions); *People v. Cavalry Chapel San Jose*, 2020 WL 7872811 (Cal. Super. Ct. 2020) (granting a plaintiff's request for a temporary restraining order enjoining "Defendants from conducting any gathering or service that did not fully comply with the State and County Public Health Orders").

<sup>95</sup> *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68-69 (2020).

<sup>96</sup> *Demetriou v. New York State Dep't of Health*, 74 Misc.3d 792, 798-99 (Sup. Ct. Nassau Cnty. 2022) (granting permanent injunction barring enforcement of State Department of Health's mask mandate because state legislation did not grant Commissioner Bassett and Governor Hochul power to enact it); *Garvey v. City of New York*, 77 Misc.3d 585, 600 (Sup. Ct. Richmond Cnty., 2022) (ruling that vaccination mandates for city employees were arbitrary and capricious).

<sup>97</sup> Michelle M. Mello & Lawrence O. Gostin, *Public Health Law Modernization 2.0: Rebalancing Public Health Powers and Individual Liberty in the Age Of COVID-19*, 42 HEALTH AFFS. 318, 321 (2023);, 50 State Survey: *Summary of Enacted Laws and Pending Bills Limiting Public Health Authority: The Second Wave*, NETWORK FOR PUB. HEALTH L. (June 1, 2022), <https://www.networkforphl.org/resources/50-state-survey-summary-of-bills-introduced-to-limit-public-health-authority/> [hereinafter *The Second Wave*]; *Proposed Limits*, *supra* note 7; Christine Vestal, *New State Laws Hamstring*

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and some enacted laws that were specific to COVID-19, but even these set a precedent that may well be followed in later pandemics.<sup>98</sup> In other cases, legislatures granted themselves veto power over various orders issued by the executive branch.<sup>99</sup>

A system of checks and balances with executive power oversight is vital to American democracy.<sup>100</sup> Nevertheless, critics argue that the new legislative trend is worrisome because it may significantly impede future emergency responses by allowing politics to take precedence over the expert opinions of professionals who staff government health agencies and are tasked with promoting public welfare.<sup>101</sup> Republican Governor Mike DeWine decried one such bill by stating: “SB 22 strikes at the heart of local health departments’ ability to move quickly to protect the public from the most serious emergencies Ohio could face.”<sup>102</sup> The Ohio legislature, however, overrode his veto of the bill. What follows is a detailed but non-comprehensive discussion of new legal constraints that affect state and local governments.

Local authorities face new restrictions in several states.<sup>103</sup> Arizona prohibited business closures by local authorities and eliminated the words “but not limited to” in describing local authority powers.<sup>104</sup> In Florida, local emergency orders automatically expire after seven days, but they may be extended with a majority vote of the local governing body for additional seven-day periods up to a total of forty-two days. However, the governor or legislature may invalidate any local measure that “unnecessarily restricts individual rights or liberties.”<sup>105</sup> Montana bars

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*Public Health Officials*, PEW (July 29, 2021, 12:00 AM), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/07/29/new-state-laws-hamstring-public-health-officials>; Lauren Weber & Anna Maria Barry-Jester, *Over Half of States Have Rolled Back Public Health Powers in Pandemic*, KFF HEALTH NEWS (Sept. 15, 2021), <https://khn.org/news/article/over-half-of-states-have-rolled-back-public-health-powers-in-pandemic/>.

<sup>98</sup> See *infra* notes 104-124 and accompanying text.

<sup>99</sup> See *infra* notes 125-133 and accompanying text.

<sup>100</sup> *Legislative Oversight of Emergency Executive Powers*, NAT’L CONF. OF STATE LEGIS., (Sept. 26, 2022), <https://www.ncsl.org/about-state-legislatures/legislative-oversight-of-emergency-executive-powers>.

<sup>101</sup> James G. Hodge & Jennifer L. Piatt, *Covid’s Counterpunch: State Legislative Assaults on Public Health Emergency Powers*, 36 BYU J. PUB. L. 31 (2021) (“Coupled with a dynamic political environment fueled by scientific denialism and distrust of government, legislative factions are poised to stymie [public health emergency] … responses.”); Mello & Gostin, *supra* note 97, at 321 (2023) (“Retrenchment bills’ extreme provisions could badly impede executive officials’ ability to respond to future emergencies.”).

<sup>102</sup> *Governor DeWine Vetoes Senate Bill 22*, STATE OF OHIO (Mar. 31, 2021), <https://governor.ohio.gov/media/news-and-media/veto-senate-bill-22-03232021>.

<sup>103</sup> *The Second Wave*, *supra* note 97.

<sup>104</sup> ARIZ. REV. STAT. ANN. § 26-311(B) (2022).

<sup>105</sup> FLA. STAT. ANN. § 252.38 (4)(c), (d) (West 2021).

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local authorities from issuing ordinances that limit access to the premises, goods, and services of private businesses unless an individual with a confirmed communicable disease is under a public quarantine order.<sup>106</sup> In Utah, chief executives of municipalities are not empowered to undertake measures to respond to epidemics or pandemics at all.<sup>107</sup>

In Ohio, local boards of health may issue quarantine or isolation orders only to individuals who have been medically diagnosed with a disease or have come into direct contact with someone who has been medically diagnosed with the disease at issue.<sup>108</sup> The law eliminates the broad authority of local health boards to close schools and ban public gatherings, instead allowing only closure of specific school buildings if there are confirmed cases of disease in the building.<sup>109</sup> Local boards of health cannot issue orders or regulations that apply to classes of persons, but rather, must target specific individuals who have been diagnosed with a disease or have come into direct contact with the disease, or businesses with documented disease occurrence in the building.<sup>110</sup>

Most COVID-19 era laws address state government powers. A common subject is vaccination, as many laws strip state governments of certain powers related to vaccine mandates. Alabama, Arkansas, Indiana, and North Dakota prohibit government entities from issuing or requiring vaccine passports.<sup>111</sup> Alabama law also prohibits educational institutions from mandating that students receive vaccines other than those required as of January 1, 2021.<sup>112</sup> Other states prohibited educational institutions from requiring proof of COVID-19 vaccination.<sup>113</sup> Ohio forbids public schools and universities to require immunization with vaccines that are not fully approved by the Food and Drug Administration (i.e. that receive only emergency use authorization).<sup>114</sup> Alabama, Arizona, Arkansas, Florida, Georgia, Mississippi, New Hampshire, North Dakota, Tennessee, and West Virginia prohibit government entities from requiring residents to receive COVID-19 vaccines in order to access public facilities, benefits, and services (though certain exceptions may apply).<sup>115</sup>

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<sup>106</sup> MONT. CODE ANN. §§ 7-5-103(2) (b)-(c), (3) (2021).

<sup>107</sup> UTAH CODE ANN. §§ 53-2a-205(1)(c), -208(1)(b) (West 2022).

<sup>108</sup> OHIO REV. CODE ANN. § 3707.11 (West 2021).

<sup>109</sup> *Id.* § 3707.26.

<sup>110</sup> *Id.* §§ 3707.54, 3709.50, 3709.212.

<sup>111</sup> ALA. CODE § 22-11B-5(a), (b) (1975); ARK. CODE ANN. § 20-7-145 (2021); IND. CODE § 16-39-11-5 (2022); N.D. CENT. CODE § 23-01-05.3 4 (2021).

<sup>112</sup> ALA. CODE § 22-11B-5(c) (2021).

<sup>113</sup> FLA. STAT. ANN. § 381.00316(3) (effective: July 1, 2021 to May 31, 2023).

<sup>114</sup> OHIO REV. CODE ANN. § 3792.04 (West 2021). Health care facilities are exempted.

<sup>115</sup> ARIZ. REV. STAT. ANN. § 36-685 (2022); ARK. CODE ANN. § 20-7-143 (2021); FLA. STAT. ANN. § 381.00316(2) (West 2021); GA. CODE ANN. § 50-1-11(b) (2022); MISS.

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Some laws protect religious entities from adverse consequences when continuing to operate during public health emergencies.<sup>116</sup> Indiana, Kentucky, and New Hampshire deem religious activities to be essential services and thus subject only to very limited restrictions.<sup>117</sup> Tennessee forbids county health officers to close religious entities for worship.<sup>118</sup>

Various laws restrict state government powers during pandemics in other ways as well. Arizona precludes state agencies from closing businesses unless there is clear and convincing evidence that “the business caused the transmission of the disease that is the subject of the order due to the business's wilful [sic] misconduct or gross negligence.”<sup>119</sup> In Arkansas, the board of health could not require businesses to regulate patrons' behavior during the COVID-19 emergency or penalize businesses for customer conduct during the pandemic.<sup>120</sup> North Dakota prohibits health authorities or elected officials from establishing mask mandates, and Tennessee requires that such mandates be renewed every fourteen days if justified by “severe conditions.”<sup>121</sup> Oklahoma bars public (and private) education authorities from requiring immunization, vaccine passports, and mask use by unvaccinated students for COVID-19.<sup>122</sup> Wyoming implemented a ten-day limit on any state health department orders (other than isolation or quarantine orders) that restrict individuals' movements or activities in order to prevent the spread of contagious diseases.<sup>123</sup> Wyoming law provides that ten-day health department orders can be followed by governor-issued orders, but these too must last no more than sixty days.<sup>124</sup>

Even state powers to declare public health emergencies have been restricted in several states. An Arizona law establishes that as of January 2021, the governor's public health emergency proclamation can last no more than thirty days with extensions for additional thirty-day periods, up to a maximum of 120 days, absent a concurrent legislative resolution.<sup>125</sup> Arkansas subjects governors' emergency declarations and board of health

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CODE ANN. § 41-23-49(2) (2022); N.H. REV. STAT. ANN. § 141-C:1-a(I) (2022); N.D. CENT. CODE § 23-12-20 (2021); TENN. CODE ANN. §§ 14-2-102(a), 16-3-4c(b)-(d) (2022); W. VA. CODE § 16-3-4c(b)-(d) (2022).

<sup>116</sup> ARIZ. REV. STAT. ANN. § 41-1495.01 (2022); MONT. CODE ANN. § 10-3-102(2) (2021).

<sup>117</sup> IND. CODE § 10-14-3-12.5(b) (2021); KY. REV. STAT. ANN. § 10-14-3-12.5(b) (West 2021); N.H. REV. STAT. ANN. § 546-C:2(I) (2021).

<sup>118</sup> TENN. CODE ANN. § 68-2-609(b) (2022).

<sup>119</sup> ARIZ. REV. STAT. ANN. § 36-787(H) (2021).

<sup>120</sup> ARK. CODE ANN. §§ 20-7-101(a), -109(c) (2021).

<sup>121</sup> See N.D. CENT. CODE § 23-07-12.1 (2021); TENN. CODE ANN. § 14-2-103 (2021).

<sup>122</sup> OKLA. STAT. tit. 70, § 1210.189 (2021).

<sup>123</sup> WYO. STAT. ANN. § 35-1-240(c) (2022).

<sup>124</sup> *Id.*

<sup>125</sup> ARIZ. REV. STAT. ANN. § 26-303(G) (2022).

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directives issued during a declared public health emergency to review by a legislative council, which may terminate emergency declarations and directives.<sup>126</sup> Pennsylvania amended its constitution to limit governor-declared disaster emergencies to twenty-one days unless extended by the legislature.<sup>127</sup> Likewise, in Florida, Kentucky, Montana, and New York, the legislature may unilaterally terminate a governor-declared state of emergency or related orders and directives.<sup>128</sup>

Ohio's legislative changes gained national notoriety.<sup>129</sup> In Ohio, a governor-declared state of emergency can last for only ninety days unless it is extended by the legislature, and the legislature can terminate a governor-declared state of emergency after thirty days.<sup>130</sup> Furthermore, the legislature may rescind any "order or rule for preventing the spread of contagious or infectious disease" issued by the governor or the Ohio Department of Health.<sup>131</sup> The legislature may also rescind any agency or department's emergency orders or rules during a state of emergency.<sup>132</sup> Moreover, individuals may challenge emergency orders and rules in court and, if successful, will have their attorney's fees and costs paid by the party that issued the challenged rule.<sup>133</sup>

Michigan entirely repealed its Emergency Powers of the Governor Act.<sup>134</sup> This statute had authorized governors to proclaim a state of emergency that was not time-limited and to promulgate reasonable rules and regulations to address emergencies.<sup>135</sup> Michigan governors may still declare emergencies under the Emergency Management Act of 1976, but the duration of such emergencies may not exceed twenty-eight days unless the legislature approves an extension for a specific number of days.<sup>136</sup>

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<sup>126</sup> ARK. CODE ANN. § 12-75-144(f) (2021).

<sup>127</sup> PA. CONST. art. 4, § 20(c) (2021).

<sup>128</sup> FLA. STAT. ANN. § 252.36(3)(a) (West 2021); KY. REV. STAT. ANN. § 10-14-3-12(a) (West 2021); MONT. CODE ANN. § 10-3-303(5)(a) (2021); N.Y. EXEC. LAW § 28(5) (McKinney 2021).

<sup>129</sup> Henry J. Gomez, *Ohio Republicans Defy Their Governor by Limiting His Power to Manage the Pandemic*, NBC NEWS (Mar. 24, 2021, 5:40 PM), <https://www.nbcnews.com/politics/elections/ohio-republicans-defy-their-governor-limiting-his-power-manage-pandemic-n1261989>.

<sup>130</sup> OHIO REV. CODE ANN. § 107.42(B)-(D) (West 2021).

<sup>131</sup> *Id.* § 101.36 .

<sup>132</sup> *Id.* § 107.43(C)(1)(a).

<sup>133</sup> *Id.* § 107.43(D)(2).

<sup>134</sup> 2021 Mich. Pub. Acts 77; Senate Fiscal Agency, *Emergency Powers of Governor; Repeal* (Sept. 1, 2021), <https://www.legislature.mi.gov/documents/2021-2022/initiative/RepealEmergencyPowersGovernorActPA77of2021sfaAnalysis.pdf>.

<sup>135</sup> *Id.*

<sup>136</sup> MICH. COMP. LAWS § 30.403(3) (2002).

### III. TRADITIONAL ROLE OF EMPLOYERS IN PROMOTING HEALTH

A growing number of legal and social barriers to government-initiated public health crisis response efforts have emerged in recent years. The COVID-19 backlash included not only changes in statutory law and jurisprudence,<sup>137</sup> but also mass protests, often featuring armed demonstrators.<sup>138</sup> As a result, the private sector may become a leading force in future responses.

Promoting workforce health is not a new phenomenon for employers. This Part argues that employers are already tasked with key responsibilities in the health arena and have independently undertaken various initiatives outside of the emergency context to promote worker health. Examples are the provision of health insurance, wellness programs, and employee assistance programs. Below is a discussion of these initiatives preceded by analysis of why employers are often interested in promoting employee health.

#### A. Employer's Interest in Workers' Health

Employers have much to gain from a healthy workforce.<sup>139</sup> Therefore, when they offer various health benefits, they are not necessarily acting altruistically.

Generous health insurance, wellness programs, and other health initiatives can help attract and retain qualified employees.<sup>140</sup> These offerings may be particularly appealing to workers who care about their health and take good care of themselves.<sup>141</sup> Such workers likely appeal to employers because they may experience fewer medical problems.

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<sup>137</sup> See *supra* Part II.

<sup>138</sup> Lois Beckett, *Armed Protesters Demonstrate Against Covid-19 Lockdown at Michigan Capitol*, THE GUARDIAN (Apr. 30, 2020, 6:54 PM), <https://www.theguardian.com/us-news/2020/apr/30/michigan-protests-coronavirus-lockdown-armed-capitol>; Zack Budryk, *Governors, Experts Await Results of Reopening States as Protests Continue*, THE HILL (May 3, 2020, 2:39 PM), <https://thehill.com/homenews/sunday-talk-shows/495877-governors-experts-await-results-of-reopening-states-as-protests/>;

<sup>139</sup> Ellen O'Brien, *Employers' Benefits from Workers' Health Insurance*, 81 MILBANK Q. 5 (2003).

<sup>140</sup> *Id.* at 6; *National Federation of Independent Business*, 142 S. Ct. at 675 (Kagan dissenting) (noting that according to OSHA, many employees would prefer employers with a COVID-19 vaccine or testing and masking mandate).

<sup>141</sup> Katherine Baicker, *Do Workplace Wellness Programs Work?* 2 JAMA HEALTH F. 1, 2 (2021)

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Good preventive care and early disease detection can help limit worker productivity and absenteeism problems.<sup>142</sup> Employees who are healthy presumably can come to work, avoid taking sick days, and perform their job tasks successfully.

Many employers also believe that preventive care and early disease detection will reduce their medical costs, though some studies have found this assumption to be untrue.<sup>143</sup> This is partly because people who live longer consume more medical care over their lifetimes.<sup>144</sup> In addition, screening an entire workforce can be very expensive and may uncover only a small number of illnesses whose treatment would have been more expensive without early detection.<sup>145</sup>

Nevertheless, employers remain enthusiastic about health-related interventions.<sup>146</sup> Medical expenditures are a critical consideration for employers.<sup>147</sup> Sixty-four percent of workers have insurance plans that are self-funded, which means that employers pay employees' medical claims out of their own coffers.<sup>148</sup> Thus, medical claims generate direct expenditures for such businesses. Self-funded plans are particularly popular among large employers.<sup>149</sup>

At the same time, high medical expenditures can raise costs for employers with fully insured plans as well. Employers with fully insured plans pay premiums to insurance companies that in turn pay medical claims for workers and their dependents.<sup>150</sup> As medical costs rise, insurers

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<sup>142</sup> O'Brien, *supra* note 139, at 6.

<sup>143</sup> Aaron E. Carroll, *Preventive Care Saves Money? Sorry, It's Too Good to Be True*, N.Y. TIMES (Jan. 29, 2018), <https://www.nytimes.com/2018/01/29/upshot/preventive-health-care-costs.html>; Joshua T. Cohen, Peter J. Neumann & Milton C. Weinstein, *Does Preventive Care Save Money? Health Economics and the Presidential Candidates*, 358 NEW ENG. J. MED. 661, 661 (2008).

<sup>144</sup> Carroll, *supra* note 143.

<sup>145</sup> Cohen et al., *supra* note 143, at 661.

<sup>146</sup> Katherine Baicker & Zirui Song, *Workplace Wellness Programs Are Big Business. They Might Not Work*, WASH. POST (June 17, 2021, 9:41 AM), [https://www.washingtonpost.com/outlook/workplace-wellness-programs-are-big-business-they-might-not-work/2021/06/16/07400886-cd56-11eb-8014-2f3926ca24d9\\_story.html](https://www.washingtonpost.com/outlook/workplace-wellness-programs-are-big-business-they-might-not-work/2021/06/16/07400886-cd56-11eb-8014-2f3926ca24d9_story.html).

<sup>147</sup> Aditya Gupta, Akshay Kapur, Monisha Machado-Pereira & Shubham Singhal, *The Gathering Storm: The Threat to Employee Healthcare Benefits*, MCKINSEY & CO. (Oct. 20, 2022), <https://www.mckinsey.com/industries/healthcare/our-insights/the-gathering-storm-the-threat-to-employee-healthcare-benefits> ("Employers across industries face profitability headwinds due to elevated healthcare costs"); Edward A. Zelinsky, *Reforming Health Care*, 31 J. LEG. MED. 203, 212 (2010) ("employers are turning to wellness programs to reduce medical costs to stay competitive").

<sup>148</sup> 2022 *Employer Health Benefits Survey*, KFF (Oct. 27, 2022), <https://www.kff.org/report-section/ehbs-2022-section-10-plan-funding/>.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

increase the insurance premiums that employers must pay.<sup>151</sup> Consequently, employers have a financial stake in employee health, and it is no surprise that many have taken an active role in promoting it.

### B. Health Insurance

In the absence of universal, government-provided health coverage, employers have become a vital source of health insurance in the United States.<sup>152</sup> Employer-provided health insurance became commonplace during World War II, when employers offered the benefit to attract workers at a time of very low unemployment.<sup>153</sup> The trend later grew further in light of unions' demand for health insurance and generous tax benefits.<sup>154</sup>

Today, employers furnish more Americans with health care coverage than any other insurance source. Nearly half of the U.S. population receives health insurance through employers (including employees' dependents).<sup>155</sup> By comparison, approximately twenty-one percent of Americans are covered by Medicaid, and a little over fourteen percent are covered by Medicare.<sup>156</sup>

Under the Affordable Care Act (ACA), employers with fifty or more full-time employees must provide affordable health insurance policies with at least minimum essential coverage to ninety-five percent of their employees or face monetary penalties.<sup>157</sup> But even before the ACA employer mandate took effect beginning in 2015,<sup>158</sup> many workplaces

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<sup>151</sup> Anna Wilde Mathews, *Health-Insurance Costs Are Taking Biggest Jumps in Years*, WALL ST. J. (Sept. 7, 2023, 4:08 PM) <https://www.wsj.com/health/healthcare/health-insurance-cost-increase-5b35ead7>

<sup>152</sup> Melissa Thomasson, *Why Do Employers Provide Health Care in the First Place?*, HARVARD BUS. REV. Mar. 15, 2019, <https://hbr.org/2019/03/why-do-employers-provide-health-care-in-the-first-place>.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Health Insurance Coverage of the Total Population*, KFF, <https://www.kff.org/other/state-indicator/total-population/> (last visited Jan. 13, 2024) (stating that the figure was 48.5% in 2021); Vaughn Himber, *Employer-Sponsored Health Insurance Statistics: What The Data Tells Us*, eHEALTH (Oct. 20, 2022), <https://www.ehealthinsurance.com/resources/small-business/how-many-americans-get-health-insurance-from-their-employer> (“In 2021, the number of people covered by health insurance from their employer sits at around 156 million, or 49% of the country’s population.”).

<sup>156</sup> KFF, *supra* note 155.

<sup>157</sup> 26 U.S.C. § 4980H; *Employer Mandate Overview*, CIGNA, <https://www.cigna.com/employers/insights/informed-on-reform/employer-mandate> (last visited Jan. 13, 2024).

<sup>158</sup> *Questions and Answers on Employer Shared Responsibility Provisions Under the Affordable Care Act*, IRS, <https://www.irs.gov/affordable-care-act/employers/questions-answers-on-employer-shared-responsibility-provisions-under-the-affordable-care-act>

provided health insurance of their own volition. For employees, health insurance benefits, which are untaxed, may have been preferable to higher salaries at workplaces that did not offer insurance and would necessitate purchasing insurance policies with after-tax income.<sup>159</sup> In 2014, employers offered sixty-six percent of nonelderly workers health insurance coverage.<sup>160</sup> The ACA appears to have generated only a small increase in this figure. In 2022, seventy percent of workers in private industry were offered health benefits.<sup>161</sup>

### C. Wellness Programs

According to a 2022 survey conducted by the Kaiser Family Foundation (KFF), most U.S. firms offer wellness programs. Through these programs, employers hope to improve employees' health, promote their wellbeing and productivity, and reduce health care costs.<sup>162</sup>

Among large firms (those with 200 or more employees) that offered health insurance benefits in 2022, fifty-five percent had wellness programs that included health risk assessments,<sup>163</sup> and forty-five percent offered biometric screenings.<sup>164</sup> In addition, eighty-five percent furnished one or more wellness offerings, such as smoking cessation and weight loss programs, lifestyle and behavioral coaching, or exercise opportunities.<sup>165</sup> Many large firms offer incentives to encourage workers to participate in or complete wellness activities.<sup>166</sup>

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and-answers-on-employer-shared-responsibility-provisions-under-the-affordable-care-act (last reviewed or updated Aug. 16, 2022).

<sup>159</sup> *Reduce Tax Preferences for Employment-Based Health Insurance*, CONG. BUDGET OFF. (Dec. 8, 2016), <https://www.cbo.gov/budget-options/2016/52246>.

<sup>160</sup> Michelle Long, Matthew Rae, Gary Claxton & Anthony Damico, *Trends in Employer-Sponsored Insurance Offer and Coverage Rates, 1999-2014*, KFF (Mar. 21, 2016), <https://www.kff.org/private-insurance/issue-brief/trends-in-employer-sponsored-insurance-offer-and-coverage-rates-1999-2014/>.

<sup>161</sup> *Coverage in Employer Medical Care Plans among Workers in Different Wage Groups in 2022*, U.S. BUREAU OF LAB. STATS. (Mar. 9, 2023), <https://www.bls.gov/opub/ted/2023/coverage-in-employer-medical-care-plans-among-workers-in-different-wage-groups-in-2022.htm>.

<sup>162</sup> *2022 Employer Health Benefits Survey*, KFF (Oct. 27, 2022), <https://www.kff.org/report-section/ehbs-2022-section-12-health-screening-and-health-promotion-and-wellness-programs/>.

<sup>163</sup> Health risk assessments are “questionnaires asking workers about lifestyle, stress, or physical health.” *Id.*

<sup>164</sup> *Id.* Biometric screenings are “in-person health examinations conducted by a medical professional.” *Id.*

<sup>165</sup> *Id.*; *Wellness Programs*, HEALTHCARE.GOV, <https://www.healthcare.gov/glossary/wellness-programs/> (last visited Jan. 13, 2024).

<sup>166</sup> KFF, *supra* note 162.

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A substantial portion of smaller firms have embraced wellness programs as well. For example, according to the KFF survey, forty eight percent of small firms offer employees health risk assessments, biometric screening, or both.<sup>167</sup>

There has been considerable debate as to the effectiveness of wellness programs.<sup>168</sup> Among large employers surveyed by KFF, Only nine percent believed that their programs were “very effective” at reducing health care costs and twenty-three percent believed they were “moderately effective” in this regard.<sup>169</sup> As for reducing the use of health care, only six percent indicated their programs were “very effective” and twenty-five percent indicated they were “moderately effective.”<sup>170</sup> Only four percent said that their programs were “very effective” at reducing employee absenteeism, while eighteen percent said that they were “moderately effective” at achieving this goal.<sup>171</sup> However, approximately half of respondents believed that their wellness programs meaningfully improved enrollees’ health and well-being (fourteen percent marked “very effective,” and thirty-five percent marked “moderately effective” in this category). Over half believed that their employees appreciated the programs as a workplace benefit (nineteen percent provided a score of “very effective” and thirty-five percent provided a score of moderately effective” in answering this query).<sup>172</sup>

Scientific studies of wellness programs confirm that their results are mixed. A five-year study of the University of Rochester Employee Wellness program, which involved 16,000 employees, found statistically significant improvements in participants’ cardiovascular disease risks.<sup>173</sup> A 2010 study found that “medical costs fall by about \$3.27 for every dollar spent on wellness programs and that absenteeism costs fall by about \$2.73 for every dollar spent.”<sup>174</sup> Some of the same researchers, however, conducted a different study, published in 2021, that was less sanguine

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<sup>167</sup> *Id.*

<sup>168</sup> See e.g., Al Lewis, *The Outcomes, Economics, and Ethics of the Workplace Wellness Industry*, 27 HEALTH MATRIX 1 (2017); Adrianna McIntyre, Nicholas Bagley, Austin Frakt & Aaron Carroll, *The Dubious Empirical and Legal Foundations of Wellness Programs*, 27 HEALTH MATRIX 59 (2017); Camila Strassle & Benjamin E. Berkman, *Workplace Wellness Programs: Empirical Doubt, Legal Ambiguity, and Conceptual Confusion*, 61 WM. & MARY L. REV. 1663 (2020).

<sup>169</sup> KFF, *supra* note 162.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> Irina Pesis-Katz, Lisa Norsen, Jason DeVoe & Renu Singh, *Reducing Cardiovascular Disease Risk for Employees Through Participation in a Wellness Program*, 23 POPULATION HEALTH MGMT. 212, 212 (2020).

<sup>174</sup> Katherine Baicker, David Cutler & Zurui Song, *Workplace Wellness Programs Can Generate Savings*, 29 HEALTH AFFS. 1,1 (2010).

about wellness programs.<sup>175</sup> It concluded that program participants had better self-reported health behaviors, such as weight management.<sup>176</sup> But it did not find significant differences “in self-reported health; clinical markers of health; health care spending or use; or absenteeism, tenure, or job performance.”<sup>177</sup> The Illinois Workplace Wellness Study likewise found no statistically meaningful changes in forty out of forty-two measured outcomes (e.g. spending, productivity, self-reported health status).<sup>178</sup> The only positive changes were that more employees reported obtaining health screenings and that in the first year of their program participation, more felt that management prioritized worker health and safety.<sup>179</sup> Other commentators emphasize that wellness program outcomes depend on their design, incentives, and integration with the health care system.<sup>180</sup>

### D. Employee Assistance Programs

Employee Assistance Programs (EAP) offer workers psychological assessments, short-term counseling, referrals, and follow-up care that are free of charge and confidential.<sup>181</sup> Employees may turn to EAPs if they experience substance abuse problems, stress, bereavement, family

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<sup>175</sup> Zurui Song & Katherine Baicker, *Health and Economic Outcomes up to Three Years after a Workplace Wellness Program: A Randomized Controlled Trial*, 40 HEALTH AFFS. 951, 951 (2021). See also, Baicker, *supra* note 141, at 2 (discussing her findings and stating that wellness programs may be worthwhile for employers if they are seeking to “add benefits that workers value” and thereby to attract health-conscious employees but not if they are seeking to “save money by reducing health care costs and absenteeism or to improve chronic physical health conditions”).

<sup>176</sup> Song & Baicker, *supra* note 175, at 951.

<sup>177</sup> *Id.*

<sup>178</sup> Damon Jones, David Molitor & Julian Reif, *What do Workplace Wellness Programs Do? Evidence from the Illinois Workplace Wellness Study*, 134 Q. J. ECON. 1747, 1750-51 (2019). See also, Julian Reif, David Chan, Damon Jones, Laura Payne & David Molitor, *Effects of a Workplace Wellness Program on Employee Health, Health Beliefs, and Medical Use A Randomized Clinical Trial*, 180 JAMA INTERNAL MED. 1952, 1952 (finding, based on the same study of University of Illinois employees, that “a comprehensive workplace wellness program had no significant effects on measured physical health outcomes, rates of medical diagnoses, or the use of health care services after 24 months, but it increased the proportion of employees reporting that they have a primary care physician and improved employee beliefs about their own health.”).

<sup>179</sup> Jones et al., *supra* note 178, at 1751.

<sup>180</sup> Irina Pesis-Katz, Lisa Norsen & Renu Singh, *Employee Wellness Programs*, 181 JAMA INTERNAL MED. 291, 291-92 (2020).

<sup>181</sup> *Employee Assistance Program (EAP)*, U.S. Off. of Pers. Mgmt., <https://www.opm.gov/frequently-asked-questions/work-life-faq/employee-assistance-program-eap/what-is-an-employee-assistance-program-eap> (last visited Jan. 13, 2024).

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difficulties, and mental health illnesses.<sup>182</sup> In 2019, seventy-nine percent of employers offered EAPs.<sup>183</sup>

Studies have shown that EAPs can improve employees' mental health and job performance. A large-scale global study revealed that EAPs were associated with reduced absenteeism and distress and enhanced work engagement and life satisfaction.<sup>184</sup> A study of state government workers found that EAP use reduced depression and anxiety symptoms (though not risky alcohol use).<sup>185</sup> The same researchers later published findings indicating that EAP users decreased absenteeism more quickly than individuals with similar problems who did not utilize EAPs.<sup>186</sup>

Nevertheless, EAPs are often severely underutilized by employees. According to experts, fewer than ten percent of workers use available EAPs.<sup>187</sup> The low utilization rates might be rooted in employer's failure to make all employees aware of their EAPs' existence, stigma surrounding mental health care, distrust that confidentiality will be safeguarded, or other factors.<sup>188</sup> Some employers are seeking ways to enhance EAPs, and some entrepreneurs are urging employers to replace traditional EAPs with on-demand, specialized online services and resources.<sup>189</sup> However EAPs

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<sup>182</sup> *Id.*; *Employee Assistance Programs (EAPs)*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., <https://www.samhsa.gov/workplace/employer-resources/provide-support> (last updated July 18, 2022).

<sup>183</sup> *Managing Employee Assistance Programs*, SOC'Y FOR HUM. RES. MGMT., <https://www.shrm.org/resourcesandtools/tools-and-samples/toolkits/pages/managingemployeeassistanceprograms.aspx> (last visited Jan. 13, 2024). *See also*, Susan Heathfield, *Do EAPs Work?* THE BALANCE (Sept. 19, 2022), <https://www.thebalancemoney.com/do-eaps-work-or-just-make-employers-feel-good-1917971> ("More than 97% of companies in the U.S with more than 5,000 employees have EAPs. Eighty percent of companies with 1,00-5,000 employees, and 75% of companies with 251-1,000 employees have EAPs").

<sup>184</sup> Mark Attridge, *A Global Perspective on Promoting Workplace Mental Health and the Role of Employee Assistance Programs*, 33 AM. J. HEALTH PROMOTION 622, 626 (2019).

<sup>185</sup> Melissa K Richmond, Fred C. Pampel, Randi C. Wood & Ana P. Nunes, *Impact of Employee Assistance Services on Depression, Anxiety, and Risky Alcohol Use: A Quasi-Experimental Study*, 58 J. OCCUPATIONAL & ENV'T. MED. 641, 641 (2016).

<sup>186</sup> Ana P. Nunes, Melissa K. Richmond, Fred C. Pampel & Randi C. Wood, *The Effect of Employee Assistance Services on Reductions in Employee Absenteeism*, 33 J. BUS. PSYCH. 699, 699 (2018).

<sup>187</sup> Theresa Agovino, *Companies Seek to Boost Low Usage of Employee Assistance Programs*, SOC'Y FOR HUM. RES. MGMT. (Nov. 21, 2019), <https://www.shrm.org/hr-today/news/hr-magazine/winter2019/pages/companies-seek-to-boost-low-usage-of-employee-assistance-programs.aspx>.

<sup>188</sup> *Id.*

<sup>189</sup> Katie Lynch, *Is It Finally Time To Reconsider Employee Assistance Programs?*, FORBES (Jan. 19, 2021, 7:20 AM), <https://www.forbes.com/sites/forbeshumanresourcecouncil/2021/01/19/is-it-finally-time-to-reconsider-employee-assistance-programs/>; *Employee Assistance Programs: What Are the Disadvantages?*, MODERN HEALTH,

may evolve, they demonstrate employers' continued concern about workers' mental and emotional wellbeing and willingness to invest in their advancement.<sup>190</sup>

#### IV. EMPLOYERS' EMERGING CONTRIBUTIONS TO WORKERS' HEALTH

In recent years, employers have been called upon to protect and support workers' health in new ways. This Part examines their contributions during the COVID-19 pandemic and in response to abortion restrictions after *Roe v. Wade*<sup>191</sup> was overturned.

##### A. Pandemic Response

When COVID-19 emerged in the United States in 2020, many employers were quick to take action.<sup>192</sup> By the middle of March, many employers had implemented remote work policies.<sup>193</sup> Between April and December of 2020, an estimated fifty percent of paid work hours consisted of telework, compared with only five percent pre-pandemic.<sup>194</sup> Employers maintained remote work policies even in the absence of state stay-at-home orders or after their expiration.<sup>195</sup>

Furthermore, employers implemented mask, testing, and vaccine rules for those working in person.<sup>196</sup> Some businesses retained face mask requirements even when state mandates ended or in states that never

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<https://www.modernhealth.com/post/disadvantages-of-employee-assistance-programs> (last visited Jan. 13, 2024).

<sup>190</sup> Heathfield, *supra* note 183.

<sup>191</sup> 410 U.S. 113 (1973).

<sup>192</sup> Megan M. O'Malley, *Taking Care of Business: An Empirical Examination of the Top S&P 500 Companies and their Role as Public Health Regulators during the Covid-19 Pandemic*, 31 U. MIAMI BUS. L. REV. 1, 3 (2023).

<sup>193</sup> *Id.* ("Almost overnight, companies transitioned to a fully remote workplace"); Clare Duffy, *Big Tech Firms Ramp up Remote Working Orders to Prevent Coronavirus Spread*, CNN Bus. (Mar. 12, 2020, 4:49 PM), <https://www.cnn.com/2020/03/10/tech/google-work-from-home-coronavirus/index.html>.

<sup>194</sup> *Telework during the COVID-19 Pandemic: Estimates Using the 2021 Business Response Survey*, U.S. BUREAU OF LAB. STAT.: MONTHLY LAB. REV., (Mar. 2022), <https://www.bls.gov/opub/mlr/2022/article/telework-during-the-covid-19-pandemic.htm>.

<sup>195</sup> Amanda Moreland et al., *Timing of State and Territorial COVID-19 Stay-at-Home Orders and Changes in Population Movement — United States, March 1–May 31, 2020*, 69 MORBIDITY & MORTALITY WKLY. REP. 1198, 1200 (Sept. 4, 2020) (detailing “[t]ype and duration of COVID-19 state and territorial stay-at-home orders … March 1–May 31, 2020”).

<sup>196</sup> O'Malley, *supra* note 192, at 25-30, 37-43.

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enacted them.<sup>197</sup> In addition, in 2022, an estimated thirty to forty percent of employers required their employees to be vaccinated.<sup>198</sup> While some states had established vaccine mandates for healthcare workers, school employees, and/or state employees, none had a mandate for all workers.<sup>199</sup> The federal Centers for Medicare and Medicaid Services also established a vaccine mandate for healthcare providers,<sup>200</sup> but the Biden administration's attempt to establish wider vaccine mandates failed.<sup>201</sup> Thus, many employers implemented vaccine mandates of their own volition, filling the void left by absent government-imposed requirements.<sup>202</sup>

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<sup>197</sup> Boston University, *Face Mask Mandates*, <https://statepolicies.com/data/graphs/face-masks/> (last reviewed Aug. 27, 2021); Andy Markowitz, *Most Big Chains Keep Masks Optional for Vaccinated Shoppers*, AARP (Feb. 28, 2022), <https://www.aarp.org/health/healthy-living/info-2020/retailers-require-face-masks-coronavirus.html> (“Major retailers encourage customers to cover faces but have mandates for staff”).

<sup>198</sup> Robert Iafolla, *Vaccine Mandates at Work Part of ‘New Normal,’ Employers Say*, BLOOMBERG L. (May 4, 2022, 12:01 AM), <https://news.bloomberglaw.com/daily-labor-report/vaccine-mandates-at-work-part-of-new-normal-employers-say> (“About four in 10 employers have some type of Covid-19 vaccine mandate for their workers”); Allen Smith, *Some Employers Still Require COVID-19 Vaccines* (Nov. 8, 2022), SOC’Y HUM. RES. MGMT., <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/some-employers-still-require-covid-19-vaccines.aspx> (stating that the number fell from 34% in 2021 to 32% in 2022); *Who’s Requiring Workers to Be Vaccinated?*, N.Y. TIMES (Feb. 23, 2022), <https://www.nytimes.com/interactive/2022/02/23/business/office-vaccine-mandate.html> (stating that the New York Times verified the vaccine policies of 129 top corporations and found that 75 of them required their employees to be vaccinated).

<sup>199</sup> *State COVID-19 Data and Policy Actions*, KFF (Feb. 10, 2022), <https://www.kff.org/report-section/state-covid-19-data-and-policy-actions-policy-actions/>; Jenny Rough & Andy Markowitz, *List of Coronavirus-Related Restrictions in Every State*, AARP (Apr. 20, 2023), <https://www.aarp.org/politics-society/government-elections/info-2020/coronavirus-state-restrictions.html>.

<sup>200</sup> *COVID-19 Vaccination Requirements for Health Care Providers and Suppliers*, CTRS. FOR MEDICARE & MEDICAID SERVS., <https://www.cms.gov/files/document/covid-19-health-care-staff-vaccination-requirements-infographic.pdf> (last visited May 1, 2023); Biden v. Missouri, 142 S. Ct. 647, 647 (2022) (upholding the federal vaccine mandate for healthcare providers).

<sup>201</sup> See *supra* notes 75-77 and accompanying text (discussing OSHA’s failed attempt to establish a vaccine mandate for employers with 100 or more employees). See also Feds for Med. Freedom v. Biden, 63 F.4th 366, 366 (5th Cir. 2023), (upholding a district court’s nationwide injunction prohibiting enforcement of President Biden’s executive order establishing a COVID-19 vaccine mandate for federal employees).

<sup>202</sup> Jeff Levin-Scherz & Mike Orszag, *Should Your Company Implement a Vaccination Mandate?*, HARV. BUS. REV. (Sept. 9, 2021), <https://hbr.org/2021/09/should-your-company-implement-a-vaccine-mandate>; Becky Sullivan, *Carhartt Blowback Shows the Tightrope Companies Face over Vaccine Mandate Decisions*, NPR (Jan. 19, 2022, 3:12 PM), <https://www.npr.org/2022/01/19/1074103265/carhartt-vaccine-mandate-covid>.

Mandate opponents warned of catastrophic workforce departures as a consequence of vaccine mandates.<sup>203</sup> But no exodus materialized.<sup>204</sup> According to one source, only one percent of over 1500 surveyed workers (consisting of five percent of those who were unvaccinated) asserted that they left their jobs because of vaccine mandates.<sup>205</sup> Similarly, prominent health policy expert Ezekiel Emanuel stated that healthcare systems with vaccine mandates “retained over 99% of their workforce.”<sup>206</sup>

In some instances, employers shied away from strict vaccine policies and chose to use carrots rather than sticks. Such employers adopted incentive programs to persuade workers to obtain vaccination.<sup>207</sup> Incentives included paid time off for purposes of getting the injection and enduring any side effects, small financial rewards, and onsite vaccination.<sup>208</sup>

### B. Travel Funds for Reproductive Care

In 2022, in *Dobbs v. Jackson Women's Health Organization*, the Supreme Court overturned *Roe v. Wade* and ruled that there is no constitutional right to abortion.<sup>209</sup> Abortion quickly became essentially unavailable or significantly limited in approximately twenty states.<sup>210</sup>

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<sup>203</sup> See *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 675 (Kagan, dissenting) (stating that employers argued that the OSHA vaccine mandate would prompt “hundreds of thousands of employees to leave their jobs”); Chris Isidore, *72% of Unvaccinated Workers Vow to Quit if Ordered to Get Vaccinated*, CNN (Oct. 8, 2021, 10:08 AM), <https://www.cnn.com/2021/10/28/business/covid-vaccine-workers-quit/index.html>; Robert King, *AHA Concerned Federal Vaccine Mandate Could Exacerbate Severe Worker Shortage*, FIERCE HEALTHCARE (Sept. 10, 2021, 4:09 PM), <https://www.fiercehealthcare.com/hospitals/aha-concerned-federal-vaccine-mandate-could-make-workforce-shortages-worse>.

<sup>204</sup> See *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 675 (Kagan dissenting) (“According to OSHA, employers that have implemented vaccine mandates have found that far fewer employees actually quit their jobs than threaten to do so.”); Megan Messerly, *Rural Hospitals Stave off Mass Exodus of Workers to Vaccine Mandate*, POLITICO (Feb. 22, 2022, 4:31 AM), <https://www.politico.com/news/2022/02/22/rural-hospitals-workers-vaccine-mandate-00010272>.

<sup>205</sup> Kathryn Mayer, *How Many Workers Have Quit to Avoid Vaccine Mandates?*, HUM. RES. EXEC. (Nov. 5, 2021), <https://hrexecutive.com/how-many-unvaccinated-workers-have-quit-to-avoid-vaccine-mandates/>.

<sup>206</sup> Dave Muoio, *How Many Employees Have Hospitals Lost to Vaccine Mandates? Here Are the Numbers So Far*, FIERCE HEALTHCARE (Feb. 22, 2022, 10:00 AM), <https://www.fiercehealthcare.com/hospitals/how-many-employees-have-hospitals-lost-to-vaccine-mandates-numbers-so-far>.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*; O’Malley, *supra* note 192, at 34, 40-43.

<sup>209</sup> 142 S. Ct. 2228 (2022).

<sup>210</sup> Elizabeth Nash & Isabel Guarnieri, *Six Months Post-Roe, 24 US States Have Banned Abortion or Are Likely to Do So: A Roundup*, GUTTMACHER INST. (Jan. 10, 2023), <https://www.guttmacher.org/2023/01/six-months-post-roes-24-us-states-have-banned-abortion-or-are-likely-to-do-so-a-roundup>.

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Severe limitations on access to abortion care is considered by many to be a new public health crisis.<sup>211</sup>

Many large employers in states with harsh restrictions responded by offering to cover travel expenses for workers who sought abortions in other locations.<sup>212</sup> These companies included Starbucks, Tesla, Yelp, Airbnb, Microsoft, Netflix, Patagonia, DoorDash, JPMorgan Chase, Levi Strauss, PayPal, Amazon, Reddit, Walt Disney Company, Meta, Warner Brothers, Patagonia, Lyft, Uber, Bank of America, Intuit, Zillow, Box, Dick's Sporting Goods, BuzzFeed, Yelp, Condé Nast, and many others.<sup>213</sup> According to one source, as of October 2022, at least 170 large and small employers had announced travel coverage policies for abortion care.<sup>214</sup> The Society for Human Resource Management estimated that in 2022, thirty-five percent of employers offered to pay for travel and lodging associated with abortion services, and it believed the number would grow significantly in the future.<sup>215</sup> In response, Texas legislators threatened to ban companies that pay for abortion travel from operating in Texas but thus far have not passed any legislation to stop it.<sup>216</sup> No data are publicly

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abortion-or-are-likely-do-so-roundup (explaining that as of January 2023, 12 states had near-total bans, 2 states had no abortion availability because of an absence of clinics providing the service, 4 states had gestational age bans, and 3 states had bans that were blocked by courts at the time).

<sup>211</sup> Elizabeth H. Bradley & Dara Anhouse, *After COVID, Another Public Health Crisis*, INSIDE HIGHER EDUC. (Nov. 2, 2022), <https://www.insidehighered.com/views/2022/11/03/lack-abortion-access-public-health-crisis-opinion>; Jennifer Piatt, *Abortion Access: A Post-Roe Public Health Emergency*, THE NETWORK FOR PUB. HEALTH (Sept. 9, 2022), <https://www.networkforphl.org/resources/abortion-access-a-post-roe-public-health-emergency/>.

<sup>212</sup> Emma Goldberg, *These Companies Will Cover Travel Expenses for Employee Abortions*, N.Y. TIMES (Aug. 19, 2022), <https://www.nytimes.com/article/abortion-companies-travel-expenses.html>.

<sup>213</sup> *Id.*

<sup>214</sup> Christine Vestal, *Privacy, Stigma may Keep Workers from Using Abortion Travel Benefits*, PEW (Oct. 3, 2022, 12:00 AM), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/10/03/privacy-stigma-may-keep-workers-from-using-abortion-travel-benefits>.

<sup>215</sup> Leah Shepherd, *Travel Benefits for Abortion Growing Quickly Among Employers*, SOC'Y FOR HUM. RES. MGMT. (Aug. 24, 2022), <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/abortion-travel-benefits-grow.aspx>.

<sup>216</sup> Zach Despart, *Businesses that Help Employees Get Abortions Could Be Next Target of Texas Lawmakers if Roe v. Wade is Overturned*, TEX. TRIB. (May 23, 2022, 5:00 AM), <https://www.texastribune.org/2022/05/23/texas-companies-pay-abortions/> (“Fourteen GOP legislators warned Lyft that they’d seek to ban companies that pay for abortions from doing business in Texas”); Reuters, *Legal Clashes Await U.S. Companies Covering Workers’ Abortion Costs*, NBC NEWS (June 27, 2022, 3:41 PM), <https://www.nbcnews.com/business/business-news/companies-offering-abortion-related-travel-expenses-legal-exposure-rcna35559>.

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available as to how much money employers are actually spending to pay for abortion-related travel.

Employers have not necessarily adopted abortion care policies altruistically. Rather, doing so often makes good business sense.<sup>217</sup> This benefit may help employers recruit and retain highly qualified workers in states that have banned abortion.<sup>218</sup> Moreover, employers may calculate that paying for an abortion when a pregnancy is unwanted is far less expensive than paying for pregnancy and delivery care and providing insurance for a dependent.<sup>219</sup>

Admittedly, some employers are far less enthusiastic about reproductive rights.<sup>220</sup> Two Supreme Court decisions have endorsed employers' right to refuse to cover contraceptives in their health insurance plans for religious or moral reasons even though contraception has been deemed an essential benefit under the Affordable Care Act.<sup>221</sup> It is currently unclear how many employers deny contraceptive coverage and whether new administrative rules could limit their ability to do so.<sup>222</sup>

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<sup>217</sup> Valarie Blake & Elizabeth Y. McCuskey, *Employer-Sponsored Reproduction*, COLUM. L. REV. (forthcoming) (“Employers tend to be antinatalist because childbearing, birthing, and rearing are costly to them both as employers and insurers.”).

<sup>218</sup> Vestal, *supra* note 214.

<sup>219</sup> Blake & McCuskey, *supra* note 217, at 5; John Deighan, *The Vital Lesson Roe v Wade Can Teach UK Pro-Lifers*, CHRISTIAN TODAY (Aug. 19, 2022, 9:40 AM), <https://www.christiantoday.com/article/the.vital.lesson.roe.v.wade.can.teach.uk.pro.lifer.s/139078.htm>.

<sup>220</sup> *Insurance Coverage of Contraceptives*, GUTTMACHER INST. (Feb. 1, 2023), <https://www.guttmacher.org/state-policy/explore/insurance-coverage-contraceptives>.

<sup>221</sup> *Id.*; Mary Tschanne & Reni Soon, *Contraceptive Coverage and the Affordable Care Act*, 42 OBSTETRICS & GYNECOLOGY CLINICS OF N. AM. 605, 606 (2015) (explaining that the Institute of Medicine’s Committee on Preventive Services for Women was tasked with determining which services should be designated as essential preventive care and that HHS adopted its recommendations concerning contraceptives); Katie Keith, *Supreme Court Upholds Broad Exemptions To Contraceptive Mandate—For Now*, HEALTH AFFS. (July 9, 2020), <https://www.healthaffairs.org/do/10.1377/forefront.20200708.110645/>; *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 682 (2014) (holding that The Religious Freedom Restoration Act permits closely held for-profit corporations to deny employees contraceptive coverage based on their owners’ religious objections); *Little Sisters of the Poor v. Pennsylvania*, 140 S. Ct. 2367, 2367 (2020) (upholding two Trump-era government rules that expanded employers’ ability to obtain religious and moral exemptions to the Affordable Care Act’s contraceptive mandate).

<sup>222</sup> In 2018, the Trump administration estimated that 109 organizations would use its rules’ expanded exemption and “between 70,500 and 126,400 individuals would be affected” by it. *Coverage of Certain Preventive Services Under the Affordable Care Act*, 88 Fed. Reg. 7236, 7260 (Feb. 2, 2023). As of this writing, the Biden administration had proposed a new rule that would revoke the moral exemption and would establish a new contraceptive arrangement for individuals enrolled in plans provided by objecting entities. *Id.* at 7236. The government sought comments regarding the number of objecting

Nevertheless, since the 2022 *Dobbs* decision, employees have learned that when the government restricts their health care rights, they may be able to turn to their employers for a remedy.<sup>223</sup>

### V. LEGAL CONSTRAINTS AND INCENTIVES

In the future, employers may have greater power to implement pandemic response measures than federal or state government authorities.<sup>224</sup> In many cases, employers will be highly motivated to keep their workforces healthy so that they can be fully staffed and remain open for business, though some may oppose response measures on principle or fear backlash.<sup>225</sup> Moreover, if employers do not implement safety measures, they may be sued by employees or their survivors for alleged negligence or other misconduct. For example, in *Benjamin v. JBS S.A.*, a son brought a wrongful death and survival suit against an employer after his father, who worked at a meat processing facility, died of COVID-19 early in the pandemic.<sup>226</sup> In *Kuciomba v. Victory Woodworks*, a husband and wife sued the husband's employer for conduct that violated local health orders and led the wife's long hospitalization after she contracted COVID-19 from her husband.<sup>227</sup> The California Supreme Court, however, ultimately held that the employer had no duty under California law to prevent the wife from becoming infected.<sup>228</sup>

This Part examines the guidance that federal and state laws provide to employers. Federal law authorizes employers to establish job-related health requirements for workers so long as they accommodate disabilities and sincerely held religious beliefs.<sup>229</sup> Likewise, most states permit

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entities and the number of individuals affected by claimed religious exemptions. *Id.* at 7261.

<sup>223</sup> *See supra* notes 209-215 and accompanying text.

<sup>224</sup> *See supra* Part II.

<sup>225</sup> *See supra* Parts III.A and VI.

<sup>226</sup> Notice of Removal, *Benjamin v. JBS S.A.*, 516 F. Supp. 3d 463, 467 (E.D. Pa. 2020), No. 2:20-cv-02594, 2020 WL 2893505 (alleging that the employer failed to follow OSHA and CDC guidance). *See also* Complaint, *Gutierrez v. Publix Super Mkts., Inc.*, No. 2020-025168-CA, 2020 WL 6993794 (Fla. Cir. Ct. Nov. 23, 2020) (claiming wrongful death and negligence and alleging that deceased employee was exposed to COVID-19 because Publix refused to allow employees to wear masks); Complaint, *Evans v. Walmart, Inc.*, No. 2020L003938, 2020 WL 1697022, (Cook Cnty. Cir. Ct., Apr. 6, 2020) (asserting wrongful death claims based on Walmart's alleged failure to implement necessary pandemic response measures).

<sup>227</sup> *Kuciomba v. Victory Woodworks*, 14 Cal.5<sup>th</sup> 993, 993 (2023).

<sup>228</sup> *Id.* at 1033.

<sup>229</sup> *See infra* Part V.A.

employers to implement pandemic response measures, though several have opted to constrain employers in a variety of ways.<sup>230</sup>

### A. Federal Law

A number of federal laws are relevant to pandemic responses.<sup>231</sup> The two that are most pertinent to employers' pandemic response activities are the Americans with Disabilities Act (ADA) and Title VII of the Civil Rights Act of 1964 (Title VII).

#### 1. *The Americans with Disabilities Act*

The ADA applies to employers with fifteen or more employees and prohibits disability-based discrimination.<sup>232</sup> The law includes a provision governing medical examinations and inquiries.<sup>233</sup> This provision requires that employers limit medical examinations and inquiries to those that are "job-related and consistent with business necessity."<sup>234</sup> The U.S. Equal Employment Opportunity Commission (EEOC) confirmed that during COVID-19, employers could ask employees about COVID-related symptoms, exposure to the illness, or vaccination status and could test employees for COVID-19.<sup>235</sup> Such inquiries are justified by concerns about workplace safety.

It is particularly important to understand that federal law does not prohibit employers from establishing health-related requirements for workers.<sup>236</sup> These can include obligating employees to wear personal protective equipment (e.g., masks), to be tested for infectious disease, or to obtain vaccinations.<sup>237</sup>

At the same time, the ADA establishes that employers must provide reasonable accommodations to workers and applicants with disabilities, unless the accommodations would impose undue hardships on workplace

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<sup>230</sup> See *infra* Part V.B.

<sup>231</sup> HIPAA, COVID-19 Vaccination, and the Workplace, U.S. DEP'T OF HEALTH & HUM. SERVS., <https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/hipaa-covid-19-vaccination-workplace/index.html> (last reviewed Sept. 30, 2021); *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws* U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eco-laws> (updated July 12, 2022) [*hereinafter* EEOC].

<sup>232</sup> 42 U.S.C. § 12111(5)(A) (2018).

<sup>233</sup> *Id.* § 12112(d) (2018).

<sup>234</sup> *Id.* § 12112(d)(4)(A) (2018).

<sup>235</sup> EEOC, *supra* note 231.

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

operation.<sup>238</sup> This mandate extends to pandemic measures.<sup>239</sup> Thus, employees who cannot receive vaccines for medical reasons might be accommodated by being allowed to wear masks and undergo frequent testing in lieu of vaccination or by being allowed to telework.<sup>240</sup>

While some employees may seek accommodations that excuse them from health-related mandates, others might request enhanced safety measures as reasonable accommodations for disabilities.<sup>241</sup> These could include air filtration systems, barriers that separate individuals from coworkers and customers, or increased spacing among workstations.<sup>242</sup> Employers who refuse such accommodations may face litigation. For example, in *EEOC v. ISS Facility Services*, the EEOC sued an employer for failing to accommodate an employee with obstructive lung disease and hypertension and refusing to allow her to work from home two days a week.<sup>243</sup> The defendant settled for \$47,500.<sup>244</sup>

### 2. *Title VII*

Title VII prohibits discrimination based on religion and applies to employers with fifteen or more employees.<sup>245</sup> The law requires employers to accommodate an employee's sincerely held religious beliefs unless doing so would entail undue hardship for the employer.<sup>246</sup> Based on language in the case of *Trans World Airlines, Inc. v. Hardison*, Title VII's mandate was traditionally deemed to impose no more than a *de minimis* burden on employers.<sup>247</sup> It was thus less stringent than the ADA's accommodation provision. The ADA explains that “undue hardship”

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<sup>238</sup> 42 U.S.C. § 12112(b)(5) (2018).

<sup>239</sup> EEOC, *supra* note 231.

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> Verdict and Settlement Summary, EEOC v. ISS Facility Services, No. 1:12CV03708, 2022 WL 18859253 (N.D. Ga. 2022).

<sup>244</sup> *Id. See also*, Complaint, Hilton-Rorar v. Gilbert, No. 5:20CV01124, 2020 WL 2612968 (N.D. Ohio 2020) (complaint filed under state anti-discrimination law for failure to accommodate employee who sought to work remotely because of her breathing difficulties).

<sup>245</sup> 42 U.S.C. §§ 2000e(b) (2018).

<sup>246</sup> *Id.* §§ 2000e(j), 2000e-2(a); *Dockery v. Maryville Acad.*, 379 F. Supp. 3d 704, 718 n.18 (N.D. Ill. 2019) (ruling that “while the ‘validity’ of a religious belief cannot be questioned, ‘the threshold question of sincerity . . . must be resolved in every case’” (quoting *United States v. Seeger*, 380 U.S. 163, 185 (1965))).

<sup>247</sup> *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977); Section 12: *Religious Discrimination*, U.S. Equal Emp. Opportunity Comm'n (Jan. 15, 2021), <https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination>.

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means “significant difficulty or expense,”<sup>248</sup> and no such definition appears in the text of Title VII.<sup>249</sup>

In its unanimous 2023 *Groff v. DeJoy* decision, however, the Supreme Court rejected the *de minimis* burden standard, asserting that “it is doubtful” that the phrase *de minimis* in the *Hardison* case “was meant to take on that large role.”<sup>250</sup> Instead, according to the Court, an employer may decline a requested religious accommodation only if “the burden of granting … [the] accommodation would result in substantial increased costs in relation to the conduct of its particular business.”<sup>251</sup> The Court did not explicitly state that the undue burden standard under Title VII is equivalent to that of the ADA, but the language it adopted echoes the ADA’s statutory definition.<sup>252</sup>

Before the *Groff* decision, employers could generally prevail in pandemic-related Title VII cases so long as they could show that the requested religious accommodation would increase risk to the health of coworkers or customers.<sup>253</sup> As the district court concluded in *Together Employees v. Mass General Brigham Incorporated*, such a risk qualified as more than a *de minimis* burden.<sup>254</sup>

In its guidance, the EEOC urged employers who received religious accommodation requests related to vaccines to consider “the proportion of employees in the workplace who already are partially or fully vaccinated

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<sup>248</sup> 42 U.S.C. § 12111(10)(A) (2018).

<sup>249</sup> See 42 U.S.C. § 2000e(j) (2018) (providing no explanation for the term “undue hardship”).

<sup>250</sup> *Groff v. DeJoy*, 600 U.S. 447, 464 (2023).

<sup>251</sup> *Id.* at 470.

<sup>252</sup> 42 U.S.C. § 12111(10)(A) (2018).

<sup>253</sup> Allen Smith, *When May an Employer Reject a Religious Accommodation Request?*, SOC’Y FOR HUM. RES. MGMT. (Oct. 14, 2021), <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/coronavirus-employer-religious-accommodation-request.aspx>.

<sup>254</sup> *Together Emps. v. Mass General Brigham Inc.*, 573 F. Supp. 3d 412, 435 (D. Mass. 2021) (denying employees’ motion for preliminary injunction to enjoin enforcement of hospital’s vaccination policy). *See also Federoff v. Geisinger Clinic*, 571 F. Supp. 3d 376, 388 (M.D. Pa. 2021) (“Geisinger has shown here that it would be more than a *de minimis* cost for them to harbor employees that are both unvaccinated and untested”); *Halczenko v. Ascension Health*, 37 F.4th 1321, 1321 (7th Cir. 2022) (affirming district court’s denial of preliminary injunction to require hospital to reinstate employee after he was fired for refusing to comply with vaccine mandate on religious grounds); Mary-Lauren Miller, *Inoculating Title VII: The “Undue Hardship” Standard and Employer-Mandated Vaccination Policies*, 89 FORDHAM L. REV. 2305, 2305 (2021). *But see Sambrano v. United Airlines*, 2022 WL 486610 (5th Cir. 2022) (indicating the decision is interlocutory and decides nothing on the merits but reversing a district court’s denial of a preliminary injunction requested by airline employees with religious objections to vaccines who were forced to choose between getting vaccinated or going on indefinite unpaid leave).

against COVID-19 and the extent of employee contact with non-employees, whose vaccination status could be unknown or who may be ineligible for the vaccine.”<sup>255</sup> It is noteworthy that the Occupational Safety and Health Act of 1970 reinforced the authority of employers to decline religious accommodations when the safety of workers or others is at stake.<sup>256</sup>

For the foreseeable future, however, employers will face uncertainty as to religious accommodation cases. Lower courts will interpret the Supreme Court’s language, and the EEOC will develop new guidance. Only time will tell how the Court’s changed standard will apply to requests for religious accommodations related to workplace health and safety measures.

### B. State Laws

Almost all states have their own laws prohibiting disability discrimination in the workplace and requiring reasonable accommodations.<sup>257</sup> Likewise, many states have enacted religious discrimination protections.<sup>258</sup> These state laws often deviate from federal law standards in important ways. Many cover much smaller employers than do Title VII and the ADA. As examples, Alaska and Montana cover employers with one or more employees,<sup>259</sup> and Iowa and New Mexico cover employers with four or more employees.<sup>260</sup> By contrast, Louisiana covers only employers with twenty or more employees.<sup>261</sup> In addition, some laws define “undue hardship” as clearly requiring employers to accept significant burdens in accommodating employees with religious needs.<sup>262</sup>

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<sup>255</sup> EEOC, *supra* note 235.

<sup>256</sup> 29 U.S.C. § 669(a)(5) (2018) (“Nothing in this or any other provision of this chapter shall be deemed to authorize or require medical examination, immunization, or treatment for those who object thereto on religious grounds, except where such is necessary for the protection of the health or safety of others.”).

<sup>257</sup> *Disability Discrimination Laws by State*, BLOOMBERG L. (Dec. 20, 2021), <https://pro.bloomberglaw.com/brief/disability-discrimination-laws-by-state/>.

<sup>258</sup> *Religious Accommodation in the Workplace: Creating an Inclusive Environment*, ANTI-DEFAMATION LEAGUE, p. 6 (2022), [www.adl.org/sites/default/files/pdfs/2022-09/ADL-Religious-Accommodations-in-the-Workplace-2023.pdf](http://www.adl.org/sites/default/files/pdfs/2022-09/ADL-Religious-Accommodations-in-the-Workplace-2023.pdf).

<sup>259</sup> ALASKA STAT. § 18.80.300(5) (2014); MONT. CODE ANN. § 49-2-101(11) (2015).

<sup>260</sup> IOWA CODE ANN. § 216.6(6)(a) (West 2018); N.M. STAT. ANN. § 28-1-2(B) (2021).

<sup>261</sup> LA. STAT. ANN. § 23:302(2) (2009).

<sup>262</sup> Anti-Defamation League, *supra* note 258, at 7, 12; ARIZ. REV. STAT. ANN. § 41-1461(15) (2022) (defining “undue hardship” as meaning “an action requiring significant difficulty or expense when considered in light of” certain specified factors); CAL. GOV’T. CODE § 12926(u) (West 2023) (defining “undue hardship” as Arizona did in the above-cited statute); N.J. REV. STAT. § 10:5-12(b)(3)(a) (2021) (“‘undue hardship’ means an

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Some state legislatures have specifically addressed the permissibility of employers' pandemic response measures through new laws passed during the COVID-19 pandemic.<sup>263</sup> Montana and Utah enacted broad laws, banning vaccine mandates altogether.<sup>264</sup> In December 2022, however, a federal district judge permanently enjoined enforcement of Montana's law in health care settings, thus allowing health care employers to require their workers to be vaccinated.<sup>265</sup> The court found that in the health care context, Montana's statute was preempted by the Americans with Disabilities Act, the Occupational Safety and Health Act, and the Equal Protection Clause.<sup>266</sup>

Idaho and Tennessee passed COVID-specific laws. In Idaho, businesses "shall not require a coronavirus vaccination as a term of employment" and shall not refuse to serve individuals based on their vaccination status.<sup>267</sup> Likewise, Tennessee established that its private businesses, governmental entities, schools, and local education agencies "shall not compel or otherwise take an adverse action against a person to compel the person to provide proof of vaccination if the person objects to receiving a COVID-19 vaccine for any reason."<sup>268</sup>

Over a dozen states legislated their own temporary or permanent disability and religious accommodation requirements for employer vaccine policies related to COVID-19.<sup>269</sup> An Arizona law specified that employers must accommodate vaccine exemption requests based on sincerely held religious beliefs "unless the accommodation would pose an undue hardship and more than a *de minimus* [sic] cost to the operation of the employer's business."<sup>270</sup> Other states, such as Florida, Indiana, North Dakota, and West Virginia, did not specify what burden employers must

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accommodation requiring unreasonable expense or difficulty, unreasonable interference with the safe or efficient operation of the workplace...").

<sup>263</sup> Nat'l Acad. for State Health Pol'y, *supra* note 8; Lowell Pearson, Jenna Brofsky, Zaina A. Niles, Alexa B. Barton & Katie Little, *50-State Update on Legislation Pertaining to Employer-Mandated Vaccinations*, HUSCH BLACKWELL, <https://www.huschblackwell.com/newsandinsights/50-state-update-on-pending-legislation-pertaining-to-employer-mandated-vaccinations> (updated Feb. 23, 2022).

<sup>264</sup> MONT. CODE ANN. § 49-2-312 (2021) (establishing that it is unlawful for "an employer to refuse employment to a person, to bar a person from employment, or to discriminate against a person in compensation or in a term, condition, or privilege of employment based on the person's vaccination status or whether the person has an immunity passport"); UTAH CODE ANN. § 34A-5-113(2)-(3) (West 2023) (establishing that it is unlawful for employers to refuse to hire or otherwise discriminate against individuals because of their vaccination status or lack of an immunity passport).

<sup>265</sup> Montana Med. Ass'n v. Knudsen, 645 F. Supp. 3d 999, 1021 (D. Mont. 2022).

<sup>266</sup> *Id.*

<sup>267</sup> IDAHO CODE § 73-503(1)-(2) (2023).

<sup>268</sup> TENN. CODE ANN. § 14-2-102 (2021).

<sup>269</sup> Nat'l Acad. for State Health Pol'y, *supra* note 8.

<sup>270</sup> ARIZ. REV. STAT. ANN. § 23-206 (2021).

bear for purposes of religious accommodation.<sup>271</sup> It is therefore possible that their courts would require employers to accommodate religious exemption requests even if doing so created risks for coworkers and customers.

It is obvious that COVID-specific laws would not apply to different pandemics or other public health emergencies. It is impossible to predict whether state legislatures would adopt similar laws in future disasters, having set the precedent for doing so. Nevertheless, most states did not interfere with employers' COVID-19 policies, and none prohibited noncoercive incentive programs that simply encouraged employees to obtain vaccinations voluntarily.<sup>272</sup> Furthermore, employers who are eager to protect the health of their workforces and customers may in the future be more aggressive about lobbying and pressuring legislatures to eschew proposals that will constrain their disaster response initiatives.

## VI. POTENTIAL CONCERNS REGARDING THE ROLE OF EMPLOYERS

This Article does not mean to suggest that a world in which employers play a key role in disaster response is a utopian one. It is simply one that may well become a reality. To be sure, support for employer action should not undermine the existence of robust public health agencies at the federal, state, and local levels. These will always be needed because of their scientific expertise and commitment to promoting the health of the general public, including individuals who are not employed or whose employers do not protect them.<sup>273</sup> But public health authorities will be well-served by nurturing employers as valued allies and a means to supplement government activities when these are constrained.

Despite the strengths and advantages of employer initiatives,<sup>274</sup> reliance on employers raises several concerns that must be acknowledged.

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<sup>271</sup> FLA. STAT. ANN. § 381.00317(1)(b) (West 2021) (“To claim an exemption based on religious reasons, the employee must present to the employer an exemption statement indicating that the employee declines COVID-19 vaccination because of a sincerely held religious belief”); IND. CODE § 22-5-4.6-5 (2022); N.D. CENT. CODE § 34-03-10(2)(c)(2) (2021) (requiring exemptions from COVID-19 vaccination for those submitting certificates stating that “religious, philosophical, or moral beliefs are opposed to such immunization”); W. VA. CODE § 16-3-4b(a)(2) (2022).

<sup>272</sup> See *supra* notes 207-208 and accompanying text; Karen Pollitz, *What Can Employers Do to Require or Encourage Workers to Get a COVID-19 Vaccine?*, KFF (Aug. 3, 2021), <https://www.kff.org/coronavirus-covid-19/fact-sheet/what-can-employers-do-to-require-or-encourage-workers-to-get-a-covid-19-vaccine/>.

<sup>273</sup> See e.g., Centers for Disease and Prevention, *CDC 24/7*, <https://www.cdc.gov/about/index.html> (last reviewed Aug. 21, 2022).

<sup>274</sup> See *supra* Parts VII.A.1-VII.A.3.

First, private employers are constrained by anti-discrimination in employment laws and in some cases, other state statutes,<sup>275</sup> but, unlike governmental entities, they are not constrained by federal constitutional provisions.<sup>276</sup> Thus, they need not protect free speech rights or meet due process requirements (e.g., by holding hearings).<sup>277</sup> It is possible, therefore, that some employers will become overzealous and implement policies in draconian ways. For example, they may require infected employees to take leave without pay for unreasonable amounts of time or take adverse action against employees who express opposition to their policies.

On the other hand, some employers may eschew public health emergency response activities as a political stance or because they face pressure from vocal opponents of health-related mandates.<sup>278</sup> In the past, hostile reactions have at times convinced companies to reverse business decisions.<sup>279</sup> In one recent instance, Target removed merchandise that celebrated Pride Month because it faced an anti-LGBT campaign that allegedly included threats to employees.<sup>280</sup>

Target is not alone in having faced calls for boycotts in response to conduct that some consumers found objectionable.<sup>281</sup> Chick-fil-A and Bud Light have also been attacked for diversity and inclusion efforts and for actions that appear to support LGBTQ rights.<sup>282</sup> Carhartt, which sells

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<sup>275</sup> See *supra* Part V.

<sup>276</sup> *Ciraci v. J.M. Smucker Co.*, 62 F.4th 278, 279 (6th Cir. 2023) (“Constitutional guarantees conventionally apply only to entities that exercise sovereign power, such as federal, state, or local governments, and, in some other instances, tribal governments”); Kimberly N. Brown, *Outsourcing, Insourcing, and the Irrelevant Constitution*, 49 GA. L. REV. 607, 612 (2015) (“Because the Constitution only applies to state action, the government’s use of private sources to conduct its work evades constitutional barriers that would otherwise operate to ensure accountability to the people.”).

<sup>277</sup> See U.S. CONST. amends. I, XIV, § 1.

<sup>278</sup> Yilang Peng, *Politics of COVID-19 Vaccine Mandates: Left/Right-Wing Authoritarianism, Social Dominance Orientation, and Libertarianism*, 194 PERSONALITY & INDIVIDUAL DIFFERENCES 111661 (2022) (analyzing how various ideologies shape people’s attitudes towards vaccine policies); Sullivan, *supra* note 202 (discussing companies that retained and abandoned vaccine mandates after the Supreme Court struck down the Biden administration’s employer vaccine mandate).

<sup>279</sup> See e.g., Nathaniel Meyersohn, *Target Removing Some Pride Merchandise after Anti-LGBTQ Threats against Staff*, CNN BUS. (May 25, 2023, 8:19 AM), <https://www.cnn.com/2023/05/23/business/target-lgbtq-merchandise/index.html>.

<sup>280</sup> *Id.*

<sup>281</sup> Prem Thakker, *If Right-Wingers Want to Boycott “Woke” Companies, Add This AR-15 Manufacturer to the List*, THE NEW REPUBLIC (May 31, 2023, 2:42 PM), <https://newrepublic.com/post/173114/right-wingers-list-boycott-woke-companies-ar-15-manufacturer>.

<sup>282</sup> *Id.*; Pallavi Gogoi, *How the Bud Light Boycott Shows Brands at a Crossroads: Use Their Voice, or Shut Up?*, NPR (June 28, 2023, 5:00 AM), <https://www.npr.org/2023/06/28/1184309434/bud-light-boycott-lgbtq-pride>.

workwear, outdoor apparel, and gear, faced calls for a boycott in January 2022 because of its vaccine mandate.<sup>283</sup>

But experts note that in the majority of cases, boycotts are ineffective or have very short-lived adverse effects.<sup>284</sup> For example, after Spotify refused to restrict COVID-19 misinformation that Joe Rogan spread through his podcast, a boycott caused Spotify's sales to drop by twelve percent.<sup>285</sup> But the calls for a boycott and the adverse financial impact dissipated within weeks, and Spotify suffered no long-term losses.<sup>286</sup> Likewise, Goya was unscathed after calls for a boycott followed its Chief Executive Officer's praise for President Donald Trump in 2020.<sup>287</sup> In fact, the boycott initiative generated a counter-offensive called a "buycott" that briefly increased sales by twenty-two percent.<sup>288</sup>

If most businesses implement health and safety measures during public health emergencies, they are unlikely to face serious boycotts because opponents will have difficulty finding companies that have shunned public health protections and can supply the goods and services they need. Even if some consumers do initiate boycotts, businesses are unlikely to suffer significant long-term harm.<sup>289</sup> Public health advocates might reward them with lucrative "buycotts," and boycott backers will likely quickly tire of their efforts and return to patronizing companies that offer the quality and convenience to which they are accustomed.<sup>290</sup>

Employers may also worry that public health interventions could make them vulnerable to being sued as state actors based on receipt of government-provided financial incentives.<sup>291</sup> The Supreme Court has held

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<sup>283</sup> Sullivan, *supra* note 202

<sup>284</sup> Stefan Sykes, *Boycotts Rarely Work — but anti-LGBTQ+ Backlash Is Forcing Companies into Tough Choices*, CNBC (June 22, 2023, 7:00 AM), <https://www.cnbc.com/2023/06/22/the-business-of-boycotts-what-can-corporate-america-do.html> (noting that the backlash against Bud Light after transgender influencer Dylan Mulvaney briefly promoted its product is an exception to the rule and has "hit particularly hard because there are similar substitutes for the light lager, constant media coverage has emboldened the boycotters, and the company has not put forth a unified strategy").

<sup>285</sup> Jūra Liaukonytė, Anna Tuchman & Xinrong Zhu, *Rejoinder: Spilling More Beans on Political Consumerism: It's More of the Same Tune*, 42 MKTG. SCI. 32, 32-33 (2023).

<sup>286</sup> *Id.* at 32-34.

<sup>287</sup> Jūra Liaukonytė, Anna Tuchman & Xinrong Zhu, *Frontiers: Spilling the Beans on Political Consumerism: Do Social Media Boycotts and Buycotts Translate to Real Sales Impact?*, 42 MKTG. SCI. 11, 11 (2023).

<sup>288</sup> *Id.* at 13 ("Importantly, this increase was temporary; there was no detectable increase in sales after three weeks.").

<sup>289</sup> See *supra* notes 284-288 and accompanying text.

<sup>290</sup> See *supra* notes 284-288 and accompanying text.

<sup>291</sup> Kate Crawford & Jason Schultz, *AI Systems as State Actors*, 119 COLUM. L. REV. 1941, 1943 (2019) (explaining when private parties may be deemed to be state actors);

that a private actor may be deemed to have engaged in state action in three circumstances: 1) when it “performs a traditional, exclusive public function,” 2) “when the government compels the private entity to take a particular action,” or 3) when the “government acts jointly with the private entity.”<sup>292</sup>

The Court emphasized that “very few functions” can be considered traditionally reserved exclusively for the states.<sup>293</sup> Establishing workplace health and safety rules should not be viewed as being among them, as employers are heavily involved in this realm.<sup>294</sup> During COVID-19, plaintiffs tried unsuccessfully to utilize the state action doctrine in *Ciraci v. J.M. Smucker Company*. Several employees sued Smucker for denying their request for a religious exemption from its COVID-19 vaccine rule, claiming that the denial violated their First Amendment rights because, as a federal contractor, the company was a government actor.<sup>295</sup> The Sixth Circuit ruled against the plaintiffs, holding that “Smucker’s does not perform a traditional, exclusive public function; it has not acted jointly with the government or entwined itself with it; and the government did not compel it to deny anyone an exemption.”<sup>296</sup> Unless tax or other incentives are so generous as to be coercive, employers that implement public health emergency response measures of their own volition should not be found to be state actors.

Perhaps the most serious concern is that if employers’ primary motivation is economic,<sup>297</sup> they may fail to implement effective measures when they judge them to be a poor investment or to be outweighed by other priorities. To illustrate, in August of 2023, In-N-Out Burger prohibited workers in five states from wearing masks absent a medical reason for doing so because it sought to emphasize customer service (e.g. welcoming customers with smiles).<sup>298</sup> But by August of 2023, the CDC no longer advised Americans to wear masks indoors.<sup>299</sup> As another

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*infra* Part VII.C (addressing government support for employers’ emergency response activities).

<sup>292</sup> *Manhattan Cnty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019).

<sup>293</sup> *Id.* at 1924.

<sup>294</sup> See *Recommended Practices for Safety and Health Programs*, OCCUPATIONAL HEALTH & SAFETY ADMIN., <https://www.osha.gov/safety-management> (last visited July 25, 2023).

<sup>295</sup> *Ciraci*, 62 F.4<sup>th</sup> at 279.

<sup>296</sup> *Id.* at 280.

<sup>297</sup> See *supra* Part III.A.

<sup>298</sup> Jonathan Franklin, *In-N-Out Burger Bans Employees in 5 States from Wearing Masks*, NPR, July 19, 2023, <https://www.npr.org/2023/07/19/1188706519/in-n-out-burger-bans-employees-from-wearing-masks>.

<sup>299</sup> Cecelia Smith-Schoenwalder, *CDC: Virtually Every American Can Stop Wearing Masks Indoors*, U.S. NEWS & WORLD REP., Mar. 18, 2022,

example of an employer prioritizing its own interests, in December of 2021, Delta Airlines asked the CDC to shorten the COVID isolation period from ten days to five days because of worries about staffing shortages.<sup>300</sup> To the consternation of some, the CDC complied and asserted that scientific evidence justified its decision.<sup>301</sup>

Employers may be particularly indifferent to the welfare of the most vulnerable workers. When the workforce consists of unskilled laborers that employers consider fungible and the facility is not open to the public, employers may decide not to devote resources to health and safety interventions. This is evidenced by the treatment of meatpacking workers early in the COVID-19 pandemic.<sup>302</sup> Rather than heed health officials' warnings to shut down plants, the meatpacking industry successfully lobbied President Trump to issue an executive order that kept facilities open.<sup>303</sup> As a result of the order and inattention to workplace safety measures, in July of 2020, six to eight percent of COVID-19 cases in the United States were linked to meatpacking plants.<sup>304</sup> In the future, however, employers who are now well-educated about pandemics and public health emergencies may behave more responsibly out of fear of adverse media coverage and litigation<sup>305</sup> if not out of a sense of moral duty.

## VII. RECOMMENDATIONS

Despite the conduct and concerns described above, many employers undertook a wide variety of initiatives to promote employees' health and well-being during the COVID-19 pandemic. Examples are:

- Establishing vaccine incentive programs and onsite vaccination clinics;

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<https://www.usnews.com/news/health-news/articles/2022-03-18/cdc-virtually-every-american-can-stop-wearing-masks-indoors>.

<sup>300</sup> Deepa Shivaram, *Delta's CEO Asked the CDC for a 5-Day Isolation. Some Flight Attendants Feel at Risk*, NPR, Dec. 29, 2021, <https://www.npr.org/2021/12/29/1068731487/delta-ceo-asks-cdc-to-cut-quarantine>.

<sup>301</sup> *Id.*

<sup>302</sup> Michael Grabell, *The Plot to Keep Meatpacking Plants Open During COVID-19*, PROPUBLICA (May 13, 2022, 3:40 PM), <https://www.propublica.org/article/documents-covid-meatpacking-tysmithfield-trump> ("Newly released documents reveal that the meatpacking industry's callousness toward the health of its workers and its influence over the Trump administration were far greater than previously known.").

<sup>303</sup> *Id.*; Exec. Order 13917, 85 Fed. Reg. 26313 (April 28, 2020), <https://www.federalregister.gov/documents/2020/05/01/2020-09536/delegating-authority-under-the-defense-production-act-with-respect-to-food-supply-chain-resources>.

<sup>304</sup> Grabell, *supra* note 302.

<sup>305</sup> *Id.*; see *supra* note 226 and accompanying text.

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- Providing employees with free masks, hand sanitizers, frequent and thorough workspace cleaning, workspace barriers, and onsite testing;
- Providing paid medical leave to employees who were diagnosed with COVID-19, cared for ill family members, or needed the time to obtain vaccines and recover from their side-effects;
- Offering financial support for costs associated with working from home; and
- Offering full coverage for virtual doctor visits and mental health care.<sup>306</sup>

All such initiatives required significant time, effort, and expenditures. Future pandemics may necessitate similar measures and perhaps additional ones as well.

Legislatures and courts must refrain from further restricting employers' ability to implement effective response measures.<sup>307</sup> In addition, government entities should use all available tools, such as guidance documents and financial assistance, to furnish resources to employers during public health emergencies.

### A. Embrace Employers as Public Health Partners

As federal, state, and local government public health powers are hindered,<sup>308</sup> public health authorities should recognize employers as important players in the public health arena. To that end, they should focus attention on employers during public health emergencies, providing them with guidance and financial support, as discussed below. Employers are less vulnerable to political pressures than government officials and may be highly motivated to safeguard workers' and consumers' welfare for economic if not moral reasons.<sup>309</sup>

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<sup>306</sup> Alan Kohll, *How One Company is Taking Care of Employees During COVID-19*, FORBES (Apr. 6, 2020, 12:49 PM), <https://www.forbes.com/sites/alankohll/2020/04/06/how-one-company-is-taking-care-of-employees-during-covid-19/>; *Frequently Asked Questions*, OCCUPATIONAL SAFETY & HEALTH ADMIN., <https://www.osha.gov/coronavirus/faqs> (last visited May 20, 2023); *Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace*, OCCUPATIONAL SAFETY & HEALTH ADMIN., <https://www.osha.gov/coronavirus/safework> (last updated Aug. 13, 2021); O'Malley, *supra* note 192, at 25-43.

<sup>307</sup> See *supra* notes 263-271.

<sup>308</sup> See *supra* Part II.

<sup>309</sup> See *supra* Part III.A; NATALIE HACKBARTH, AARON BROWN & HENRY ALBRECHT, SOC'Y FOR HUM. RES. MGMT., WORKPLACE WELL-BEING: PROVIDE MEANINGFUL BENEFITS TO ENERGIZE EMPLOYEE

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By default, employers are likely to shoulder more responsibility for health emergency responses in the future. Ideally, employers will implement health and safety rules, subject to religious and disability accommodations.<sup>310</sup>

In the alternative, employers may opt to offer employees incentives rather than to establish mandates.<sup>311</sup> Studies have shown that monetary inducements can be effective to a degree, especially if they are large.<sup>312</sup> A Swedish study found that payments equivalent to \$24.00 increased vaccination rates by 4.2 percent.<sup>313</sup> Another study examined the outcomes of a large device manufacturer's incentive program that offered U.S.-based employees \$1,000 for proving that they were fully vaccinated by September 30, 2021.<sup>314</sup> Among 500 employees who were not fully vaccinated prior to the program's establishment, 214 (42.8%) became fully vaccinated by the deadline.<sup>315</sup> Nevertheless, these figures may be disappointing to employers who hope to achieve close to a one-hundred percent vaccination rate, and such businesses may conclude that incentive programs alone are inadequate.<sup>316</sup> Whichever form they take, workplace

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HEALTH, ENGAGEMENT, AND PERFORMANCE (2023), [www.shrm.org/resourcesandtools/hr-topics/benefits/documents/resources-whitepapers-health-and-well-being.pdf](http://www.shrm.org/resourcesandtools/hr-topics/benefits/documents/resources-whitepapers-health-and-well-being.pdf); Lynn S. Paine, *Covid-19 is Rewriting the Rules of Corporate Governance*, HARV. BUS. REV. (Oct. 6, 2020), <https://hbr.org/2020/10/covid-19-is-rewriting-the-rules-of-corporate-governance> ("In the wake of Covid-19 boards can expect institutional investors, governments, and the general public to renew their calls for companies to pay more attention to societal problems and to take a more active role in helping address them.").

<sup>310</sup> See *supra* Parts IV.A. and V.A.

<sup>311</sup> See *supra* notes 206-207 and accompanying text.

<sup>312</sup> Christopher Labos, *Christopher Labos: Do Vaccine Incentives Actually Work?*, MONTREAL GAZETTE (Aug. 3, 2021), <https://montrealgazette.com/opinion/columnists/christopher-labos-do-vaccine-incentives-actually-work> (answering the title's question by stating: "[t]he short answer, research suggests, is a qualified yes").

<sup>313</sup> Pol Campos-Mercade, Armando N. Meier, Florian H. Schneider, Stephan Meier, Devin Pope & Erik Wengström, *Monetary Incentives Increase COVID-19 Vaccinations*, 374 SCI. 879, 879 (2021).

<sup>314</sup> Archelle Georgiou, Jessica Chang & Pinar Karaca-Mandic, *Association of Large Financial Incentives With COVID-19 Vaccination Uptake Among Employees of a Large Private Company*, 5 JAMA NETWORK OPEN e229812 (2022).

<sup>315</sup> *Id.* at 2. See also, *Cleveland-Cliffs Reports Final Results of the Company-Wide COVID Vaccination Incentive Program*, CLEVELAND-CLIFFS INC. (Aug. 24, 2021, 5:41 PM), <https://www.clevelandcliffs.com/news/news-releases/detail/529/cleveland-cliffs-reports-final-results-of-the-company-wide> (reporting that an incentive program that paid employees \$1500 (and in some circumstances \$3000) raised the company's vaccination rate from 35% to 75%).

<sup>316</sup> Aleksandra M. Golos, Alison M. Buttenheim, Ashley Z. Ritter, Elizabeth F. Bair & Gretchen B. Chapman, *Effects of an Employee Covid-19 Vaccination Mandate at a Long-Term Care Network*, 42 HEALTH AFFS. 1140, 1140 (2023) (finding that 56.2% of 1,208 workers who were unvaccinated before the employer issued a mandate became vaccinated thereafter, though 20.9% were terminated for noncompliance); Michelle M.

public health emergency response initiatives can benefit both businesses and other stakeholders in several ways.

### ***1. Harnessing Employers' Existing Experience***

Many employers have extensive experience operating wellness programs.<sup>317</sup> These programs often involve health screening; health risk assessment; flu vaccination clinics; nutrition education; exercise activities; programs relating to stress reduction, smoking cessation, and weight loss; and more.<sup>318</sup>

Some employers also conduct preemployment testing to ensure that applicants are qualified for particular jobs.<sup>319</sup> Employers may test for drug use, physical abilities, cognitive abilities, and personality traits.<sup>320</sup>

Consequently, many employers are skilled at managing health-related matters. They can competently collect and store necessary data, maintain confidentiality, educate employees, administer tests and vaccinations, and comply with applicable laws and regulations such as the Americans with Disabilities Act and the HIPAA Privacy Rule.<sup>321</sup> Such employers, therefore, are well-equipped to engage in public health emergency initiatives.

### ***2. Advancing Employers' Interests***

Employers have much to gain from protecting the health of their workers and customers during public health emergencies (and at all other

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Mello et al., *Effectiveness of Vaccination Mandates in Improving Uptake of COVID-19 Vaccines in the USA*, 400 LANCET 535, 536 (2022) (“employer-based vaccination requirements are relatively straightforward to enforce through adverse employment consequences”).

<sup>317</sup> See *supra* Part III.C.

<sup>318</sup> *Designing and Managing Wellness Programs*, SOC'Y FOR HUM. RES. MGMT., <https://www.shrm.org/resourcesandtools/tools-and-samples/toolkits/pages/designingandmanagingwellnessprograms.aspx> (last visited May 17, 2023).

<sup>319</sup> *Screening by Means of Pre-Employment Testing*, SOC'Y FOR HUM. RES. MGMT., <https://www.shrm.org/resourcesandtools/tools-and-samples/toolkits/pages/screeningbymeansofpreemploymenttesting.aspx> (last visited May 17, 2023).

<sup>320</sup> *Id.* See also Sharona Hoffman, *Cognitive Decline and the Workplace*, 57 WAKE FOREST L. REV. 115, 135-36 (2022).

<sup>321</sup> 42 U.S.C. § 12112(d) (discussing medical examinations and inquiries); *HIPAA Privacy and Security and Workplace Wellness Programs*, U.S. DEP'T OF HEALTH & HUM. SERVS., <https://www.hhs.gov/hipaa/for-professionals/privacy/workplace-wellness/index.html> (last reviewed Apr. 20, 2015).

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times).<sup>322</sup> As noted above, health initiatives can help employers recruit and retain highly qualified employees, reduce absenteeism and productivity problems, and control costs.<sup>323</sup> Many employers strive to be appreciated as creating good work environments, and industry has created “Top Workplaces Awards” to recognize their efforts.<sup>324</sup> Focusing on employee health and wellbeing may be vital to becoming a desirable workplace, especially when employers must compete for qualified workers.<sup>325</sup>

During pandemics, mandating testing, masking, vaccines, and other appropriate measures can make the difference between staying open for business or closing temporarily or even permanently.<sup>326</sup> It is thus often in employers’ best interest to help reduce or control disease spread in order to avoid closure due to shutdown orders or lack of staffing. Employers with too many ill and absent employees may not be able to operate efficiently or at all. Customers who know that a business has not implemented pandemic safety precautions may choose to go elsewhere.<sup>327</sup> Likewise, employees may be distracted by anxiety about their health or may search for different, safer jobs.<sup>328</sup> Appropriate pandemic response

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<sup>322</sup> Martin Gelter & Julia M. Puaschunder, *COVID-19 and Comparative Corporate Governance*, 46 J. CORP. L. 557, 560 (2021) (“resiliency will increasingly require firms to ensure they work toward developing a healthy workforce”).

<sup>323</sup> See *supra* Part III.A; *Engaging Employees in Their Health and Wellness*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/workplacehealthpromotion/initiatives/resource-center/case-studies/engage-employees-health-wellness.html> (last reviewed Aug. 24, 2018); Stephen Miller, *Employers See Wellness Link to Productivity, Performance*, SOC’Y FOR HUM. RES. MGMT. (Feb. 25, 2015), <https://www.shrm.org/resourcesandtools/hr-topics/benefits/pages/wellness-productivity-link-.aspx>.

<sup>324</sup> *Top Workplaces USA 2023*, TOP WORK PLACES, <https://topworkplaces.com/award/top-workplaces-usa/2023/> (last visited May 17, 2023).

<sup>325</sup> Energage, *30 Strategies to Improve Employee Well-Being*, TOP WORK PLACES (Sept. 19, 2022), <https://topworkplaces.com/how-to-improve-employee-wellbeing/>.

<sup>326</sup> Amy Dusto, *Vaccine Mandates: A Public Health Tool for Employers*, JOHNS HOPKINS BLOOMBERG SCH. OF PUB. HEALTH (Feb. 22, 2022), <https://publichealth.jhu.edu/2022/vaccine-mandates-a-public-health-tool-for-employers>; Gery P. Guy Jr., *Association of State-Issued Mask Mandates and Allowing On-Premises Restaurant Dining with County-Level COVID-19 Case and Death Growth Rates — United States, March 1–December 31, 2020*, 70 MORBIDITY & MORTALITY WKLY. REP. 350, 350 (2021) (“Mask mandates and restricting any on-premises dining at restaurants can help limit community transmission of COVID-19 and reduce case and death growth rates.”).

<sup>327</sup> Elisabeth Rosenthal, *Analysis: ‘Don’t Be Afraid of COVID’? Not Buying It, Unless Businesses Do Job Right*, KFF HEALTH NEWS (Oct. 6, 2020), <https://kffhealthnews.org/news/analysis-covid-precautions-how-companies-earn-trust-and-business/>.

<sup>328</sup> Emma Goldberg & Lananh Nguyen, *As Offices Open and Mask Mandates Drop, Some Anxieties Set In*, N.Y. TIMES (Mar. 18, 2022), <https://www.nytimes.com/2022/03/18/business/office-mask-mandates.html>.

measures, therefore, may be critical to the viability of businesses during pandemics.

Disaster response initiatives may also help companies that embrace environmental, social, and governance concerns (ESG) fulfill social responsibility goals.<sup>329</sup> ESG constitutes a way to evaluate companies with respect to a variety of socially desirable objectives.<sup>330</sup> Such aims include suitable treatment of employees and customers.<sup>331</sup> Companies that effectively address public health threats could show that they care deeply about the welfare of their employees, consumers, and the community at large. Combatting disease and other disasters could consequently yield both moral satisfaction and positive ESG assessments.

### **3. Reducing Health Disparities**

As demonstrated by COVID-19, pandemics disproportionately affect minorities, including those who are Black, indigenous, and people of color.<sup>332</sup> African American patients often have underlying conditions such as diabetes, chronic respiratory disease, and hypertension that make them more vulnerable to severe forms of infection.<sup>333</sup> Minorities are more likely to work in jobs that require in-person presence rather than remote work, to have crowded work and living environments, and to need to use public transportation, all of which put them at greater risk of becoming infected and spreading illness.<sup>334</sup> In addition, many people of color face health care

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<sup>329</sup> Jill Cooper & Matthias Sayer, *Environment Social Governance: Getting It Right*, 52 No. 4 A.B.A. TRENDS 14 (2021); Gelter & Puaschunder, *supra* note 322, at 607 (“A growing number of firms have begun to include ESG criteria (Environmental, Social, Governance) in executive compensation.”).

<sup>330</sup> Mark S. Bergman, Ariel J. Deckelbaum & Brad S. Karp, *Introduction to ESG*, Harv. L. Sch. F. on Corp. Governance (Aug. 1, 2020), <https://corpgov.law.harvard.edu/2020/08/01/introduction-to-esg/>.

<sup>331</sup> Raj Gnanarajah & Gary Shorter, *Introduction to Financial Services: Environmental, Social, and Governance (ESG) Issues*, CONG. RSCH. SERV. (Jan. 5, 2023), <https://crsreports.congress.gov/product/pdf/IF/IF11716>.

<sup>332</sup> Elizabeth Ann Andraska, Olamide Alabi, Chelsea Dorsey, Young Erben, Gabriela Velazquez, Camila Franco-Mesa & Ulka Sachdev, *Health Care Disparities During the COVID-19 Pandemic*, 34 SEMINARS IN VASCULAR SURGERY 82, 83 (2021); Nambi Ndugga, Latoya Hill & Samantha Artiga, *COVID-19 Cases and Deaths, Vaccinations, and Treatments by Race/Ethnicity as of Fall 2022*, KFF (Nov. 17, 2022), <https://www.kff.org/racial-equity-and-health-policy/issue-brief/covid-19-cases-and-deaths-vaccinations-and-treatments-by-race-ethnicity-as-of-fall-2022/>; Katharine Van Tassel, Carmel Shachar & Sharona Hoffman, *Covid-19 Vaccine Injuries — Preventing Inequities in Compensation*, 384 NEW ENG. J. MED. e34, e35 (2021).

<sup>333</sup> Andraska et al., *supra* note 300, at 83; Daniel C. DeSimone, *Why are people of color more at risk of being affected by coronavirus disease 2019 (COVID-19)?*, MAYO CLINIC (Oct. 6, 2022), <https://www.mayoclinic.org/diseases-conditions/coronavirus/expert-answers/coronavirus-infection-by-race/faq-20488802>.

<sup>334</sup> Andraska et al., *supra* note 300, at 83; DeSimone, *supra* note 333.

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access barriers, such as lack of insurance or distance from affordable health care providers, and some distrust the medical profession and are loath to seek its services.<sup>335</sup>

When employers implement pandemic response measures, including vaccines, masking, testing, and social distancing requirements, they provide invaluable protections to workers and their families and could thereby reduce health disparities. Economically disadvantaged employees who want vaccines may not be able to obtain them on their own because of lack of transportation, difficulty navigating online registration systems, inability to arrange time away from work, or other barriers.<sup>336</sup> Offering vaccines on-site or support for vaccination elsewhere (e.g., paid time off or small financial incentives that could pay for transportation) could enable economically disadvantaged employees to obtain otherwise inaccessible injections.<sup>337</sup> Protecting workers from infection also benefits their family members and friends with whom they come in contact and thus could contribute significantly to promoting health equity during pandemics.

### B. Support Employers through Detailed Guidance

During COVID-19, employers benefited from a variety of guidance documents that were developed by government agencies. At the federal level, these included the Centers for Disease Control and Prevention,<sup>338</sup> the Department of Labor,<sup>339</sup> the Occupational Safety and Health Administration,<sup>340</sup> the Equal Employment Opportunity Commission,<sup>341</sup>

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<sup>335</sup> Andraska et al., *supra* note 300, at 83; DeSimone, *supra* note 333.

<sup>336</sup> Richard Lu, Suhas Gondi & Alister Martin, *Inequity in Vaccinations Isn't Always about Hesitancy, It's about Access*, ASS'N AM. MED. COLLS. (Apr. 12, 2021), <https://www.aamc.org/news/inequity-vaccinations-isn-t-always-about-hesitancy-it-s-about-access>.

<sup>337</sup> *Id.*; see *supra* notes 199-201 and accompanying text.

<sup>338</sup> National Center for Immunization and Respiratory Diseases (U.S.). Influenza Division, *Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 (COVID-19), May 2020: Plan, Prepare and Respond [sic] to Coronavirus Disease 2019*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://stacks.cdc.gov/view/cdc/88409> (May 5, 2020).

<sup>339</sup> *Coronavirus Resources*, U.S. DEP'T OF LAB., <https://www.dol.gov/coronavirus> (last visited May 20, 2023).

<sup>340</sup> Occupational Safety & Health Admin., *supra* note 306.

<sup>341</sup> *Coronavirus and COVID-19*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/coronavirus> (last visited May 18, 2023).

and the Safer Federal Workforce.<sup>342</sup> State and local governments issued guidance for employers as well.<sup>343</sup>

The guidance provided vital information about safety protocols in the workplace and legal and regulatory compliance.<sup>344</sup> In future public health emergencies, federal, state, and local government entities should recognize the role of employers in pandemic response and should likewise provide accessible and useful resources for them.

### C. Financial Support and Incentives

Although the federal government may not succeed in directly imposing many pandemic-related mandates, it can use its taxing and spending powers to influence the behaviors of other parties.<sup>345</sup> The federal government has long used tax credits to incentivize and reward business conduct.<sup>346</sup> For example, the Work Opportunity Tax Credit is a federal tax subsidy for businesses that hire disadvantaged workers belonging to certain target groups.<sup>347</sup> The Disabled Access Credit grants eligible small businesses tax credits to cover costs incurred to comply with the Americans with Disabilities Act of 1990.<sup>348</sup>

During COVID-19, the federal government provided extensive economic support to Americans impacted by COVID-19 and applied a similar approach to employers. Congress passed the Coronavirus Aid,

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<sup>342</sup> *Protecting the Federal Workforce During the COVID-19 Pandemic*, SAFER FED. WORKFORCE, <https://www.saferfederalworkforce.gov/overview/> (last visited May 18, 2023).

<sup>343</sup> See e.g., California ALL, *Safety in the Workplace*, <https://covid19.ca.gov/workers-and-businesses/> (last updated Apr. 19, 2023); *Responding to COVID-19 in the Workplace*, CNTY. OF LOS ANGELES PUB. HEALTH, <http://publichealth.lacounty.gov/acd/ncorona2019/workplaceresponse/> (last visited May 19, 2023); Ohio Dep’t of Health, *Coronavirus (COVID-19)*, <https://coronavirus.ohio.gov/employers-and-employees> (last visited May 19, 2023).

<sup>344</sup> See *supra* notes 338-343.

<sup>345</sup> See *supra* Parts I.A., II.A.

<sup>346</sup> Lourdes Germán & Joseph Parilla, *How Tax Incentives Can Power More Equitable, Inclusive Growth*, BROOKINGS (May 5, 2021), <https://www.brookings.edu/blog/the-avenue/2021/05/05/how-tax-incentives-can-power-more-equitable-inclusive-growth/> (“For decades, tax incentives have been a major policy tool to spur economic development and attract and retain good jobs.”).

<sup>347</sup> *Work Opportunity Tax Credit*, IRS, <https://www.irs.gov/businesses/small-businesses-self-employed/work-opportunity-tax-credit> (last reviewed or updated Oct. 12, 2022)

<sup>348</sup> *Tax Benefits for Businesses Who Have Employees with Disabilities*, IRS, <https://www.irs.gov/businesses/small-businesses-self-employed/tax-benefits-for-businesses-who-have-employees-with-disabilities> (last reviewed or updated June 13, 2022). Eligible businesses are those “that earned \$1 million or less or had no more than 30 full time employees in the previous year.”

Relief, and Economic Security (CARES) Act in March 2020<sup>349</sup> and the American Rescue Plan Act (ARPA) in March 2021.<sup>350</sup> The CARES Act offered employers a variety of payroll relief programs, including payroll tax deferral, employee retention credit to help employers facing economic hardship pay salaries, and other tax credits to help cover the costs of paid sick leave and family leave.<sup>351</sup> ARPA extended the employee retention credit and paid leave credit programs and also established a state small business credit initiative to support businesses with fewer than ten employees and those owned by socially and economically disadvantaged individuals.<sup>352</sup>

These legislative interventions set an important precedent that should be followed in future public health emergencies. Moreover, funding should be made available specifically to support employers' health-related activities, such as offering onsite vaccines and testing, providing workers with free personal protective equipment, and other appropriate interventions.

## VIII. CONCLUSION

Employers played a vital public health role during the COVID-19 pandemic, and their importance as public health emergency responders will likely only grow in the coming years. In future pandemics, federal public health authorities will likely be enfeebled, and the same will be true in many states.<sup>353</sup>

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<sup>349</sup> 15 U.S.C. §§ 9001-9141.

<sup>350</sup> Pub. L. No. 117-2, 135 Stat. 4 (2021).

<sup>351</sup> *Payroll Relief Programs*, U.S. DEP'T OF THE TREASURY, <https://home.treasury.gov/policy-issues/coronavirus/assistance-for-american-industry/payroll-relief-programs> (last visited May 20, 2023). See also *Temporary Rule: Paid Leave Under the Families First Coronavirus Response Act*, U.S. DEP'T OF LAB., <https://www.dol.gov/agencies/whd/ffcra> (last visited May 21, 2023) (explaining that the Families First Coronavirus Response Act provides “American private employers that have fewer than 500 employees with tax credits for the cost of providing employees with paid leave taken for specified reasons related to COVID-19”).

<sup>352</sup> *Fact Sheet: The American Rescue Plan Will Deliver Immediate Economic Relief to Families*, U.S. DEP'T OF THE TREASURY (Mar. 18, 2021), <https://home.treasury.gov/news/featured-stories/fact-sheet-the-american-rescue-plan-will-deliver-immediate-economic-relief-to-families>.

<sup>353</sup> See *supra* Part II; Robert Lafolla, *Law on Vaccine Mandates Sparks Doubts for Response to Next Virus*, BLOOMBERG L. (May 11, 2023, 5:10 AM), <https://news.bloomberglaw.com/daily-labor-report/law-on-vaccine-mandates-sparks-doubts-for-response-to-next-virus>; Maggie Davis, Lauren Dedon, Stacey Hoffman, Andy Baker-White, David Engleman & Gregory Sunshine, *Emergency Powers and the Pandemic: Reflecting on State Legislative Reforms and the Future of Public Health Response*, 21 J. EMERGENCY MGMT 19, 19-35 (2023) (discussing enhancements to and limitations of government emergency response powers).

## Employers and the Privatization of Public Health

In a 2023 statement associated with a Supreme Court case, Justice Gorsuch expressed his hostility towards Covid-19-related public health interventions in no uncertain terms. He declared: “Since March 2020, we may have experienced the greatest intrusions on civil liberties in the peacetime history of this country. Executive officials across the country issued emergency decrees on a breathtaking scale.”<sup>354</sup> Justice Gorsuch then went on to decry a large number of perceived civil liberty intrusions with dramatic flair.<sup>355</sup> This text may well portend forthcoming decisions regarding governmental public health authority.

Consequently, increasing responsibility will lie with employers - the parties that often have a financial stake in the health of individuals. In other words, we may be undergoing a transition to growing privatization of public health.

Admittedly, employers can only implement interventions for their workers rather than for all Americans. But the protection of employees will reach far beyond the workforce and be of value to many others as well. Employees’ families and friends will benefit if workers do not bring illness home from their jobs, and customers will benefit if facilities have taken precautions and are keeping their staff members healthy. Thus, employers can contribute a great deal to limiting disease spread.

It is possible that courts and state governments will reverse course if a future pandemic were to be much more lethal than COVID-19. The mortality rate for people infected with COVID-19 in the United States was 1.1 percent.<sup>356</sup> By contrast, the average mortality rate for patients with Ebola is approximately fifty percent.<sup>357</sup> If such a disease were to spread widely in the United States, politics may be abandoned, and desperation may lead to the renewed empowerment of governmental public health authorities.

Until such a time, however, policy makers and the public should recognize employers as important public health partners. With adequate guidance and financial support, employers can fill many of the voids left by recent pandemic legislation and jurisprudence.

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<sup>354</sup> Statement of Gorsuch, *supra* note 1.

<sup>355</sup> *Id.*

<sup>356</sup> Johns Hopkins Univ. & Med., *Mortality Analyses*, <https://coronavirus.jhu.edu/data/mortality> (last visited May 22, 2023) (indicating that the university stopped collecting data on March 10, 2023).

<sup>357</sup> Pan Am. Health Org., *Ebola Virus Disease*, <https://www.paho.org/en/topics/ebola-virus-disease#:~:text=The%20virus%20is%20transmitted%20to,to%2090%25%20in%20past%20outbreaks> (last visited May 22, 2023).