

# MEATPACKING, MIGRANT LABOR, OSHA, AND

## COVID-19

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## I. INTRODUCTION

The United States industrial animal agriculture has continued to raise concerns regarding the conditions in which animals for slaughter are raised, the use of antibiotics, and the negative environmental impacts. Consumers who purchase humanely raised meat will often forget that the people who package the meat do not experience the same humane treatment as the animals they package.

In 1998, Deborah F., a former employee of Iowa Beef Packers ("IBP") in Perry, Iowa, encountered a fellow worker in his mid-twenties whose hands were so severely damaged that he was having trouble getting food into his mouth.<sup>1</sup> Deborah expressed to him, "no job [was] worth his hands," to which he responded that he was a man who "earned his pay, [...] that only women whined about sore hands."<sup>2</sup>

In 2019, Monica R., a worker from a Smithfield-owned hog plant in Crete, Nebraska, reported; "Everyone who goes to the plant is risking their lives every day, [...] You come home and give thanks to God because we don't know when we're going to get hurt."<sup>3</sup> Another worker from a different plant expressed fear—with no resolution: "We are afraid to say that something is hurting... we are afraid that we will be fired... The pressure that we have there has a lot of influence because we are afraid of a lot things."<sup>4</sup>

Lacking adequate safety infrastructure prior to the pandemic of 2020, meatpacking plants were set up to fail and would ultimately be the reason their workers lost their lives. The "Coronavirus" (hereinafter "COVID-19" or "the virus") ravished meat and poultry plants and caused more workers to die from COVID-19 than any other work-related cause in the past 15 years.<sup>5</sup> The deaths of these workers were not inevitable—but entirely preventable. Failure by employers to ensure worker safety meant that COVID-19 needlessly spread throughout communities of color at rapid rates.

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<sup>1</sup> DEBORAH FINK, *CUTTING INTO THE MEATPACKING LINE*, 110 (Chapel Hill U. of NC Press, 1998).

<sup>2</sup> *Id.*, at 4.

<sup>3</sup> Brian Stauffer, *When We're Dead and Buried, Our Bones Will Keep Hurting*, HUMAN RIGHTS WATCH (Sept. 4, 2019), <https://www.hrw.org/report/2019/09/04/when-were-dead-and-buried-our-bones-will-keep-hurting/workers-rights-under-threat>.

<sup>4</sup> Athena K. Ramos et al., *Health and Well-Being of Hispanic/Latino Meatpacking Workers in Nebraska*, 69 SAGE J. 564, 568 (2021).

<sup>5</sup> U.S. Bureau of Labor Stat., *Injuries, Illnesses, & Fatalities*, (last visited Mar. 20, 2022) (2020) <https://www.bls.gov/iif/oshcfoi1.html>.

The Occupational Safety and Health Administration Act (“OSHA”) of 1970 was created to enforce safety and health regulations—which plants must follow. However, OSHA failed to exercise its statutory powers to investigate these safety concerns properly. Currently, no statutory language indicates how records are to be adequately maintained. Had there been proper protocols for workplace injury reporting before the 2020 pandemic, these precautions could have significantly reduced the infection rate among an already vulnerable population of workers.

The failures of industrial agriculture during the COVID-19 pandemic have exposed life-threatening health disparities among migrant workers, thus furthering the need to enforce legislation that will safeguard a more humane food system that values the people providing essential services. Lasting changes must be made through statutory amendments to OSHAA, congressional funding, or an Oregon grant program.

## II. THE MEATPACKING INDUSTRIAL COMPLEX

### A. Background

The term “meatpacking” or “meat processing” encompasses all manufacturing of meat products involving the processing of beef, pork, poultry, and fish.<sup>6</sup> Meatpacking is the largest segment within U.S. agriculture, employing more than 330,000 people and paying a national average of less than \$15 an hour.<sup>7</sup> Three hundred twenty-six million Americans are fed by the slaughtering, processing, and packaging of billions of animals processed through these plants each year.<sup>8</sup>

In the 1980’s, industrial agriculture migrated from small production plants near densely populated cities to larger, more centralized plants in rural America closer to feeding lots.<sup>9</sup> Larger plants have successfully lowered the price of meat for the consumer by

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<sup>6</sup> Michael S. Worrall, *Meatpacking Safety: Is OSHA Enforcement Adequate*, 9, DRAKE J. AGRIC. L. 299, 305(2004).

<sup>7</sup> Stauffer, *supra* note 3, at 14.

<sup>8</sup> Jennifer Dillard, *A Slaughterhouse Nightmare: Psychological Harm Suffered by Slaughterhouse Employees and the Possibility of Redress Through Legal Reform*, GEO. J. ON POVERTY, L., & POL’Y, Forthcoming, 1-2 (2007).

<sup>9</sup> Jae Young Kim & Saba Rasheed Ali, *Expanding the Constructs of Grief and Loss in Capturing the Human Experience*, 53 PRO. PSYCH.: RSCH. & PRAC. 90, 91 (2022).

increasing the speed of line production and reducing workers' wages.<sup>10</sup> "Line Speed" refers to the operation rate for production machinery for slaughtering and processing plants and encompasses each stage needed for the final packaged meat product.<sup>11</sup>

By 2004, four companies controlled 81% of the beef market, 59% of the pork market, and 50% of the poultry production.<sup>12</sup> With the move from urban to rural locations, employees had less access to labor unions, thus increasing the hiring of immigrants and decreasing the protection of those workers.<sup>13</sup>

Historically, American meat plant owners target marginalized communities to supply low-wage labor jobs. More recently, they have been contracting with refugee resettlement agencies to employ asylum seekers and state prisons to work the third shift alongside other line workers.<sup>14</sup> A single meat processing facility is likely to have more than a dozen different languages spoken by the employees.<sup>15</sup>

Priding themselves on "tak[ing] the skill out of every step," IBP and other meat monopolies of the industry capitalize on migrant labor to increase profit margins.<sup>16</sup> Meatpacking plants utilize a low-educated workforce who have minimal knowledge of safety and health standards and their rights as employees.<sup>17</sup> As a result, these workers are less likely to report safety issues, making data collected from these plants unreliable.

Meatpacking plants slaughtered an average of 50 cattle an hour in the 1960s, this figure increased to 175 by the 1980s.<sup>18</sup> The meatpacking and meat product manufacturing industry has the highest rate of repetitive-motion injuries, with the most common injury being lacerations.<sup>19</sup> 45,900 workplace injuries were reported in 2020 within the industry compared to 50,900 in 2019.<sup>20</sup> Although underreporting of occupational injuries and illnesses is common in the industry, rates are

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<sup>10</sup> ERIC SCHLOSSER, *FAST FOOD NATION: THE DARK SIDE OF THE ALL-AMERICAN MEAL*, 56, (Mariner Books, 2001).

<sup>11</sup> Stauffer, *supra* note 3, at 50.

<sup>12</sup> J. Dillard, *supra* note 8, at 56.

<sup>13</sup> Eric Schlosser, *Fast Food Nation: The Dark Side of the All-American Meal*, 56, (2001).

<sup>14</sup> Oxfam America, *Lives on the Line: The Human Cost of Cheap Chicken*, 34 (Oct. 26, 2015). (The third shift refers to the last shift during the day that is responsible for cleaning the facility).

<sup>15</sup> Stauffer, *supra* note 3, at 19.

<sup>16</sup> UPTON SINCLAIR, *THE JUNGLE* (Double Day, Page & Co., Feb. 26, 1906).

<sup>17</sup> J. Dillard, *supra* note 8.

<sup>18</sup> E. Schlosser, *supra* note 13.

<sup>19</sup> Worrall, *supra* note 6, at 305.

<sup>20</sup> Employer-Reported Workplace Injuries and Illnesses.

still twice that of other private industries.<sup>21</sup> The CDC released a report on work-related injuries in the meatpacking industry in 1989 but has yet to release more up-to-date findings.<sup>22</sup>

Studies have continuously found that the increase in speed lines directly correlates to the rise in workplace injuries and accidents.<sup>23</sup> Cumulative trauma disorders (CTDs) account for almost half of the occupationally related illnesses reported each year to the Bureau of Statistics.<sup>24</sup> CTD is a class of musculoskeletal disorders causing damage to the tendons, tendon sheaths, muscles, and nerves of the hands, wrists, elbows, shoulders, neck, and back.<sup>25</sup> To successfully treat CTD patients, plants must have non-surgical options such as: splints for early treatment; resting sore areas; anti-inflammatory medicines; ice packs; and special exercises.<sup>26</sup>

Workers attend safety meetings but do not receive further action from employers to implement self-care tactics into their work routines.<sup>27</sup> The practice of organized team stretching before a shift is abandoned, and line workers are left to stretch when their line stops for unrelated safety reasons.<sup>28</sup> Workers have no choice but to use reactive strategies to manage work-related pain, including massage, ice/heat, topical ointments, acetaminophen, and ibuprofen. When prescribed medications for hypertension and diabetes, workers have reported lower productivity levels and increased bathroom visits needed.<sup>29</sup> Workers are often not allowed to use the restroom; as a result, they will not take medications that have side effects increasing the need to use the bathroom.<sup>30</sup>

The nurses staffed by the plants are solely in charge of treating all lacerations and are the only approved personnel to touch injured

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<sup>21</sup> U.S. BLS, *supra* note 5.

<sup>22</sup> CAROL CONROY, *WORK-RELATED INJURIES IN THE MEATPACKING INDUSTRY*, 20, J. Safety Rsch. (1989).

<sup>23</sup> Jessica G. Ramsay et al., *Health Hazard Evaluation Report: Evaluation of Carpal Tunnel Syndrome and Other Musculoskeletal Disorders Among Employees at a Poultry Processing Plant*, NAT'L INST. OF OCCUPATIONAL SAFETY AND HEALTH, Mar. 2019, at 1.

<sup>24</sup> *Id.*

<sup>25</sup> Worrall, *supra* note 6, at 305.

<sup>26</sup> Ergonomics Program Management Guidelines for Meatpacking Plants, OCCUPATIONAL SAFETY AND HEALTH ADMIN., 1993, at 1, <https://www.psha.gov/publications.OSHA3123>.

<sup>27</sup> Ramos, *supra* note 4, at 568.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*, at 567.

<sup>30</sup> *Id.*

workers who have fallen to the floor and are bleeding out.<sup>31</sup> Plant production pressure undermines any ability to recover from work-related injuries properly.

### *B. Occupational Safety & Health Administration Act (OSHAA)*

[An Act:] To assure safe and healthful working conditions for working men and women; by authorizing enforcement of the standards developed under the Act; by assisting and encouraging the States in their efforts to assure safe and healthful working conditions; by providing for research, information, education, and training in the field of occupational safety and health; and for other purposes.<sup>32</sup>

OSHA has jurisdiction over nearly seven million worksites and prioritizes its resources for hazardous workplaces as follows: 1) Imminent danger situations; 2) Severe injuries and illnesses; 3) Worker Complaints; 4) Referrals; 5) Targeted inspections; 6) Follow-up inspections.<sup>33</sup>

Before the enactment of the Occupational Safety and Health Administration Act in 1970, safety was the province of the states, and their mechanism for enforcement was their respective workers' compensation laws.<sup>34</sup> The primary goal Congress hoped to accomplish through OSHAA's enactment was regulating working conditions to lower injury and death rates.<sup>35</sup>

#### *1. Employers are Required to Maintain Records of Injuries in Compliance with the Act through Self-Inspection of Injuries by the Recordkeeper*

As part of the Secretary of Health and Human Services responsibility, §20 of the Act requires research related to occupational safety and health to formulate industry safety standards properly.<sup>36</sup> The

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<sup>31</sup> *Id.*, at 569-70.

<sup>32</sup> Occupational Safety and Health Administration Act, 29 U.S.C. § 657 (1970).

<sup>33</sup> *OSHA Fact Sheet*, OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, Aug. 2016, at 1, <https://www.osha.gov/sites/default/files/publications/factsheet-inspections.pdf>.

<sup>34</sup> Worrall, *supra* note 6.

<sup>35</sup> 29 U.S.C. § 657.

<sup>36</sup> 29 U.S.C. § 669.

Secretary can require employers to measure, record, and report all information they request.<sup>37</sup>

OSHA does not include information regarding employers' best practices for such recordkeeping. Employers with more than ten employees must keep a record of serious work-related injuries and illnesses; minor injuries need not be recorded.<sup>38</sup> Under OSHA's definition of a recordable injury or illness, employers are expected to assess the degree of an employee's injury and then correctly respond based on their assessment.<sup>39</sup> If a significant accident occurs while on the line but does not result in an injury, the employer is not required to report this incident.<sup>40</sup>

Workplace practices that use recordkeeping numbers as part of their performance evaluation have incentivized employees to maintain records improperly. Injuries not reported by recordkeepers untimely help their job evaluation; in contrast, performance reviews with higher injury rates will be unfavorable.<sup>41</sup> Prioritizing a low injury rate, the record keepers of plants can be incentivized to under-report if it is used to measure their job performance.<sup>42</sup>

## 2. *The Bureau of Labor Statistics Survey of Occupational Injuries & Illnesses*

The Bureau of Labor Statistics ("BLS") gathers data directly from employers on behalf of OSHA. The Survey of Occupational Injuries and Illnesses ("SOII") requires survey participants to report information on injuries and illnesses under the OSHA recordkeeping regulations. BLS attempts to provide informative occupational safety and health data to gather and publish work injury and illness data with detailed industry, occupation, and incident information.<sup>43</sup> The SOII is

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<sup>37</sup> *Id.*

<sup>38</sup> U.S. Dep't of Lab., *OSHA Injury & Illness Recordkeeping & Reporting Requirements*, <https://www.osha.gov/recordkeeping/>

<sup>39</sup> *Id.*

<sup>40</sup> Marc Linder, *Fatal Subtraction: Statistical MIAs on the Industrial Battlefield*, 20 J. OF LEGIS. 99, 119 (1994).

<sup>41</sup> Sara E. Wuellner & David K. Bonauto, *Exploring the Relationship Between Employer Recordkeeping & Underreporting in the BLS Survey of Occupational Injuries & Illness*, 57 AM. J. INDUS. MED. 1133, 1141 (2014).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

the only system publishing national and state-level data for most U.S. states.<sup>44</sup>

From July 1971 through 1991, BLS estimated 88,430 fatalities.<sup>45</sup> After 1977, BLS chose only to publish data for establishments with eleven or more employees; as a result, the survey scope reduced the sample by 85,000.<sup>46</sup> In 1981, OSHA inspectors terminated random onsite inspections when they determined, based on employers' logs, that the firms' lost workday injury rates were lower than the national average for manufacturing.<sup>47</sup> With no straightforward recordkeeping process, employers are solely responsible for accurately tracking workplace injuries, only needing to turn over their data when formally requested by the Secretary.<sup>48</sup>

In 2014, an independent study on Washington State SOII participants reported that 90% failed to comply with one or more of the required components through misunderstanding or disregarding the OSHA recordkeeping regulations.<sup>49</sup> There are many reasons employers fail to follow OSHA recordkeeping regulations: the misinterpretation of the rules, such as a lack of understanding. There have been incidents of employees returning to work the day following an injury. Contrary to regulation, this injury is not included in the logs because there were no "actual" days off.<sup>50</sup>

### III. COVID-19 DEMANDED EMPLOYERS TO RESPOND AT A RAPID PACE TO AVOID UNNECESSARY INFECTION TO EMPLOYEES AND THEIR FAMILIES.

An infectious respiratory disease caused by a novel "Coronavirus" was first reported on Dec. 31, 2019, in China.<sup>51</sup> Responses from around

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<sup>44</sup> Christina L. Rappin et al., *Employer Reasons for Failing to Report Eligible Workers' Compensation Claims in the BLS Survey of Occupational Injuries and Illnesses*, 59 AM. J. INDUS. MED. 343 (2016).

<sup>45</sup> Linder, *supra* note 40, at 119.

<sup>46</sup> *Id.*

<sup>47</sup> *OSHA Enforcement Policy*: Hearings before a Subcommittee of the Committee on Government Operations House of Reps., 98<sup>th</sup> Cong. 12 (statement from Mr. Miles—workday refers to the amount of time lost due to injuries).

<sup>48</sup> Occupational Safety and Health Administration Act, 29 USC § 669 (1970).

<sup>49</sup> Wuellner, *supra* note 41.

<sup>50</sup> Rappin, *supra* note 44, at 350.

<sup>51</sup> Press Release, WHO Timeline –COVID –19, WORLD HEALTH ORGANIZATION, (27 Apr., 2020), <https://www.who.int/news/item27-04-2020-who-timeline---covid-19>.

the world varied in their levels of urgency to the virus. On Mar. 11, 2020, the World Health Organization (“WHO”) declared the virus a pandemic.<sup>52</sup> On Mar. 13, 2020, President Donald Trump declared a national emergency and issued "Coronavirus Guidelines" three days later.<sup>53</sup>

On April 28, President Trump signed an executive order compelling meat-processing plants to remain open because of their "critical infrastructure."<sup>54</sup> President Trump relied on the authority of the Defense Production Act to mandate that critical food supply chains stay open and to issue guidance from the Department of Labor to provide further liability protections.<sup>55</sup>

The CDC began to roll out provisions and guidance to help farmers minimize the spread of the virus while still trying to maintain food-supply production.<sup>56</sup> The CDC recommended periodic infection control, occupational safety, and health training for all workers, and supervisors should be tailored to literacy levels and preferred languages.<sup>57</sup> In some facilities, information was not translated into non-English signs during the early months of the pandemic.<sup>58</sup>

#### *A. OSHA’s Virtual Inspections and “Guidance” Failed to Mitigate the Spread of the Virus*

Onsite inspections have historically resulted in employers promptly addressing problems identified by OSHA; this was not the case during the pandemic. COVID-19 has disproportionately impacted the Latino community economically, with about half of the Latino population in the U.S. reporting that someone in their household lost a job or took a pay cut.<sup>59</sup> According to OSHA officials, to prevent the spread of the virus and "ensure continued, effective use of resources,"

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<sup>52</sup> *Id.*

<sup>53</sup> Exec. Order No. 13617, 85 Fed. Reg. 26313 (2020).

<sup>54</sup> Exec. Order No. 13617, 85 Fed. Reg. 26313 (2020).

<sup>55</sup> *Id.*

<sup>56</sup> Jonathan W. Dyal et al., *COVID-19 Among Workers in Meat and Poultry Processing Facilities—19 States*, CTRS. FOR DISEASE CONTROL AND PREVENTION, at 1 (Apr. 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/mm6918e3.htm#suggestedcitation>.

<sup>57</sup> *Id.*

<sup>58</sup> Ramos, *supra* note 4, at 568.

<sup>59</sup> Jens Manuel Krogstad et al., Letter to the Editor, *U.S. Latinos among hardest hit by pay cuts, job losses due to coronavirus*, PEW RESEARCH CENTER, April 3, 2020, at 1, <https://www.pewresearch.org/fact-tank/2020/04/03/u-s-latinos-among-hardest-hit-by-pay-cuts-job-losses-due-to-coronavirus/>.

most onsite inspections were suspended and replaced with phone calls, video conferences, or emails.<sup>60</sup> Complaints to OSHA increased 15% in 2020 compared to 2019 while conducting 35% fewer inspections.<sup>61</sup>

OSHA issued guidance based on CDC, Food and Drug Administration, and Environmental Protection Agency guidelines to employers on protecting themselves and their employees from the virus.<sup>62</sup> The issued guidance contains recommendations and descriptions of mandatory safety and health standards, but guidance is not a standard, not a regulation, and creates no legal obligations.<sup>63</sup> Guidance is not enforceable, and employers cannot be required to comply.<sup>64</sup> Instead, guidance can be used to support violations of OSHA's Duty Clause:

(a) Each employer –

(1) *shall* furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

(2) *shall* comply with occupational safety and health standards promulgated under this Act.

(b) Each employee *shall* comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this Act which are applicable to his own actions and conduct.<sup>65</sup>

Guidance is evidence that may be used to show: 1) the hazard was recognized; and 2) there was a feasible and useful method to correct the hazard.

Another route OSHA could have taken was issuing an Emergency Temporary Standard (ETS), which creates a legal obligation that the agency and employers must fulfill.<sup>66</sup> The Secretary of Labor shall provide an ETS if they determine:

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<sup>60</sup>Office of Inspector Gen., Office of Audit, U.S. Dep't of Labor, 19-21-003-10-105, *COVID-19: Increased Worksite Complaints and Reduced OSHA Inspections Leave US Workers' Safety at Increased Risk* 8 (2021), <https://www.oig.dol.gov/public/reports/oa/2021/19-21-003-10-105.pdf>.

<sup>61</sup> *Id.*, at 5.

<sup>62</sup> *Id.*, at 13.

<sup>63</sup> Occupational Safety and Health Administration Act, 29 U.S.C. § 654 (1970).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> Occupational Safety and Health Administration Act, 29 U.S.C. § 657 (1970).

(A) Employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and

(B) Such an emergency standard is necessary to protect employees from such danger.<sup>67</sup>

OSHA has not used its statutory power to issue an ETS since 1983. Former Principal Deputy Assistant Secretary Lauren Sweatt responded to a request from the House Committee on Education and Labor, stating, “the efforts of employers would take to document compliance with such a standard would distract them from other vital response activities OSHA can best meet the needs of America’s workers by being able to rapidly respond in a flexible environment.”<sup>68</sup>

On May 29, 2020, OSHA denied the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) petition to promulgate an ETS.<sup>69</sup> The denial was due to the sanitation standard which provides hygiene requirements that, directly and indirectly, address the potential for infectious disease agents to spread at the workplace.<sup>70</sup> OSHA determined there was a lack of sufficient evidence to find that infectious diseases generally pose a “grave danger” to workers’ safety.<sup>71</sup> Nonetheless, Virginia, Michigan, Oregon, and California developed an ETS to address COVID-19.<sup>72</sup>

### *B. Oregon OSHA’s Response*

Like many states, Oregon struggled with communication and creating a plan to help migrant workers throughout the agricultural industry. Oregon OSHA received reports from the Migrant and Seasonal Farmworker Program regarding the health and safety of minors.<sup>73</sup> On Apr. 28, 2020, the Oregon Department of Agriculture expressed concerns to Oregon OSHA about a 12-week backorder for

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<sup>67</sup> *Statement on the Status of the OSHA COVID—19 Healthcare ETS*, U.S. DEPT. OF LABOR, at 1 (2021), <https://www.osha.gov/coronavirus/ETS>.

<sup>68</sup> Dep’t of Labor, *supra* note 60, at 14.

<sup>69</sup> *Id.*, at 15.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> Documenting COVID-19, *Oregon Occupational Safety and Health Office’s COVID-19 emails and migrant farm response*, 155-56 (Dec. 28, 2020), <https://documentingcovid19.io/record/133>.

toilet/handwashing distributors.<sup>74</sup> On June 15, 2020, there were reports about Linn County not providing agricultural workers face masks due to “local command centers” requiring employers to formally request them.<sup>75</sup> It was not until May 6, 2020, that discussions began regarding providing a housing package for migrant workers.<sup>76</sup>

Oregon enacted an ETS to cover healthcare, restaurants, retail, construction, and other general industry employees and took effect Nov. 16, 2020. Oregon's ETS requires more measures for exceptionally high-risk jobs, including: detailed infection control training and planning; sanitation procedures for routine cleaning and disinfection; operation of existing ventilation systems according to standards; and use of barriers, partitions, and airborne infection isolation rooms.<sup>77</sup>

The Oregon legislature attempted to pass HB 2356 in 2021, which provided 150% of laborers' hourly rate for work beyond 40 hours a week.<sup>78</sup> An amendment introduced by Representative Andrea Salinas would have lessened the burden on farmers. Still, it would require the state of Oregon to set aside \$100 million to assist farmers over three years.<sup>79</sup> Farmers strenuously opposed the bill in 2021 and, by the end of the session, the bill died before Governor Brown could sign it.<sup>80</sup>

The agriculture overtime concept was renewed during the short session of 2022 and successfully signed into law, making Oregon the eighth state to mandate overtime pay for farmworkers, a right denied to them for 80 years.<sup>81</sup> With HB 4002 passed, the bill imposes an average of \$26 an hour for overtime compared to \$17 an hour regardless of the number of hours worked.<sup>82</sup> Opposition to the bill argued the cost would ultimately fall onto the consumer—a California study disproves this argument.<sup>83</sup> A 40-hour overtime law went into

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<sup>74</sup> *Id.*, at 45.

<sup>75</sup> *Id.*, at 1316.

<sup>76</sup> *Id.*, at 6.

<sup>77</sup> *Id.*, at 13.

<sup>78</sup> H.B. 2358, 81st Legis. Assemb., Reg. Sess. (Or. 2021).

<sup>79</sup> Legis. Fiscal Office, 81st Legis. Assemb., Fiscal Impact Statement for HB2358 A (Or. June 17, 2021), <https://olis.oregonlegislature.gov/liz/2021R1/Measures/Overview/HB2358>.

<sup>80</sup> H.B. 2358.

<sup>81</sup> Lynne Terry, *Oregon Legislature Passes Bill Mandating Overtime Pay for Farmworkers*, OREGON CAPITAL CHRONICLE (Apr. 1, 2020), <https://oregoncapitalchronicle.com/2022/03/03/oregon-legislature-passes-bill-mandating-overtime-pay-for-farmworkers/>.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

effect in 2022; it was found that consumers were only paying pennies more for their produce.<sup>84</sup>

#### IV. TYSON FOODS COMPANY PRIORITIZED PROFITS AND MAINTAINING THEIR PRE-PANDEMIC PRODUCTION RATE OVER THE HEALTH AND SAFETY OF THE LINE-WORKERS

On or about March 13, 2020, Tyson Foods Company (“Tyson”) “suspended all commercial business travel, non-essential visitors from entering Tyson offices and facilities, and mandated that all non-critical employees at its corporate office locations work remotely.”<sup>85</sup> By April, it was known amongst upper management that COVID-19 had breached the facility in Waterloo, Iowa.<sup>86</sup> Tyson’s facility in Waterloo was their largest pork plant in the United States and employs over 2,800 workers who process approximately 19,500 hogs daily.<sup>87</sup> On April 3, 2020, the CDC recommended that all Americans wear face coverings in public to prevent the spread of the virus.<sup>88</sup>

In a wrongful death suit against Tyson, injured plaintiffs alleged the following: 1) Management was aware of the danger of the virus; 2) Tyson failed to provide and maintain a safe work environment; 3) Tyson purposefully and knowingly put their employees at serious risk of illness or death.<sup>89</sup> According to the lawsuit filed by the family of Isidro Fernandez, who died in April of 2020, Tyson would move line workers between a different Iowa plant and the Waterloo plant but did not adequately test or quarantine workers before they entered the Waterloo facility.<sup>90</sup>

Tyson did not provide appropriate personal protective equipment and failed to implement sufficient social distancing or safety measures to protect workers from contracting the virus.<sup>91</sup> Instead, Tyson required its employees to work long hours in cramped conditions and, as a result,

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<sup>84</sup> *Id.*

<sup>85</sup> *Fernandez v. Tyson Foods*, 509 F. Supp. 3d. 1, 13 (N.D. Iowa 2020) (The order only pertained to their U.S. Operations).

<sup>86</sup> *Id.*

<sup>87</sup> Laurel Wamsley, *Tyson Foods Fires 7 Plant Managers Over Betting Ring On Workers Getting COVID-19*, NPR (Dec. 16, 2020), <https://www.npr.org/sections/coronavirus-live-updates/2020/12/16/947275866/tyson-foods-fires-7-plant-managers-over-betting-ring-on-workers-getting-covid-19#:~:text=Tyson%20Managers%20Suspended%20After%20Allegedly,12%2C000%20cases%20and%20193%20deaths.>

<sup>88</sup> *Tyson Foods*, 509 F. Supp. 3d. at 14.

<sup>89</sup> *Id.*, at 6-7.

<sup>90</sup> *Id.*, at 2.

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

thousands of Tyson employees were infected with COVID-19 at the Waterloo Facility and across their other facilities.<sup>92</sup> The complaint states Tyson offered \$500 "thank you bonuses" to employees who showed up for every scheduled shift for three months — a policy that the plaintiffs argue incentivized sick workers to keep working.<sup>93</sup>

Tyson Foods fired seven managers at the Iowa pork plant after investigating the allegations of bets placed on workers based on how many would contract the virus.<sup>94</sup> Tyson managers organized a "cash buy-in, winner-take-all betting pool for supervisors and managers to wager how many employees would test positive for COVID-19."<sup>95</sup> Waterloo managers conducted the office pool within minutes of trying to mass test all 2,800 workers for the virus.<sup>96</sup>

Black Hawk County Sherriff, Tony Thompson, visited the plant in April of 2020; he witnessed workers crowded elbow to elbow and not wearing face coverings.<sup>97</sup> The Black Hawk County Health Department recorded more than 1,000 COVID-19 infections among Tyson employees, more than one-third of the Waterloo facility workforce.<sup>98</sup>

April 28, 2020, President Donald Trump signed an Executive Order "classifying meat processing plants as essential infrastructure that must remain open [...] to avoid risk to the nation's food supply."<sup>99</sup> Tyson argued that the Waterloo facility had operated as critical infrastructure according to the emergency plans from the Presidential Policy Directive 21 of the Obama Administration.<sup>100</sup> The Court found Tyson was in constant contact with the Department of Homeland Security (DHS) and the United States Department of Agriculture (USDA) regarding operations; this did not constitute "subjection, guidance, or control [involving] an effort to assist, or to help carry out, the duties or task of the federal superior."<sup>101</sup> Tyson claimed to have been acting under the direction of the President and therefore could not close their facilities. However, they closed the Waterloo facility from April 22, 2020, to May 7, 2020. The Court argued that even if they had

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

<sup>93</sup> *Id.* at 94.

<sup>94</sup> Wamsley, *supra* note 87.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> Tyson Foods, 509 F. Supp. 3d. at 17.

<sup>99</sup> Exec. Order No. 1,3917, 3 C.F.R. 26313 (2020).

<sup>100</sup> Tyson Foods, 509 F. Supp. 3d. at 46.

<sup>101</sup> *Id.*

to remain open, they were not directed by a federal officer to operate negligently.<sup>102</sup>

Ultimately, the Court concluded that the petition did not contain a federal question and, therefore, the Court lacked subject matter jurisdiction over the case because plaintiffs asserted common-law tort claims for negligence and fraudulent misrepresentation.<sup>103</sup> Furthermore, the Court found that "even though the Court has determined that removal based on federal question jurisdiction is not permitted in this case, the Court found that Tyson did not objectively act unreasonably given this case's complexity and novel nature."<sup>104</sup>

## V. CREATING A SOLUTION TO A COMPLEX ISSUE

### A. Option 1: Federal Statutory Language (Amendment)

Employers' confusion surrounding the standard of recordkeeping is an obstacle to accurate recordkeeping.<sup>105</sup> § 657 of OSHA lays out how employers are to comply with the standard of recordkeeping:

1)Each employer shall make, keep, and preserve, and make available to the Secretary or the Secretary of Health and Human Services such records regarding his activities relating to this chapter as the Secretary, in cooperation with the Secretary of Health and Human Services, may prescribe by regulation as necessary or appropriate for the enforcement of this chapter or for developing information regarding the causes and prevention of occupational accidents and illnesses. In order to carry out the provisions of this paragraph, such regulations may include provisions requiring employers to conduct periodic inspections. The Secretary shall also issue regulations requiring that employers, through posting of notices or other appropriate means, keep their employees informed of their protections and obligations under this chapter, including the provisions of applicable standards.<sup>106</sup>

Currently, no provision instructs employers how to comply with § 657. There is also no standard from OSHA on who is to determine

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<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*, at 46-47.

<sup>105</sup> Wuellner, *supra* note 41.

<sup>106</sup> Occupational Safety and Health Administration Act, 29 U.S.C. § 657 (1970).

what should be categorized as a reportable injury.<sup>107</sup> This leaves the responsibility of accurate medical reporting to the establishment's record keeper, regardless of medical training. To address this, Congress can amend a portion of § 657 by inserting new text that will require injuries to be seen by a medical professional before employers can categorize them:

[(c)(4) The Secretary of Health and Human Services shall require reports of all workplace injuries to be made to a medical professional immediately after the injury for further investigation as to the severity of the injury. Cumulative Trauma Disorders (CTD) are to be accounted for in reporting.]

Implementing the term "shall" within a statute signifies that specific behavior is mandated; in contrast, the term "may" leaves room for discretion.<sup>108</sup> The issue is data created by employers are often inaccurate because of misunderstandings surrounding what rises to the level of a workplace injury.

OSHA defines what a "reportable" injury is to include: any work-related fatality; any work-related injury or illness that results in loss of consciousness, days away from work, restricted work, or transfer to another job; any work-related injury or illness requiring medical treatment beyond first aid; any work-related diagnosed case of cancer, chronic irreversible diseases, fractured or cracked bones or teeth, and punctured eardrums.<sup>109</sup> By requiring all workplace injuries to be vetted by a medical professional, employer logs will have a higher probability of being accurate. This is because those trained to understand medical injuries and the protocol for categorizing an OSHA report.

To help overcome medical treatment barriers, a provision needs to be created to protect workers who cannot afford a visit to a medical office. Similar to a previous OSHA provision surrounding recordkeeping, a new rule requires facilities with more than 50 employees to provide medical insurance and or pay for doctors' visits for their employees.

Challengers of this provision may argue that this will deeply burden small farms, and the price will fall on the consumer. Along with the new amendment, language can be drafted to allow for a tax

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<sup>107</sup> *Id.*

<sup>108</sup> VALERIE C. BRANNON, CONG. RSCH. SERV., R45153, STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS (2022).

<sup>109</sup> Occupational Safety and Health Administration Act, 29 U.S.C. § 657 (1970).

provision that will enable farmers to apply for tax credits based on standards set by either OSHA or Congress.<sup>110</sup>

### *B. Option 2: Congressional Funds*

Each fiscal year the president submits a budget to Congress for the federal government. Congress must then pass appropriations bills to provide money to carry out government programs for that year.<sup>111</sup> These bills are usually divided up by the type of program and into 13 separate bills, for example: Agriculture, Commerce, Energy and Water, etc..<sup>112</sup> Congress can allocate money to the Department of Labor through this process.

Congress has the authority to write specific language as to how the funds are to be allocated within OSHA. In Congress's appropriation to the Department of Labor in 2022, funds were allocated for the purposes of training, with a breakdown of how much money is to go to what kind of training. For example: (i) \$100,000,000 (increased by \$5,000,000) shall be for the purpose of developing, offering, or improving educational or career training programs at community colleges, defined as public institutions of higher education.<sup>113</sup>

With the appropriation funding completed each fiscal year, Congress has numerous chances to implement a requirement that OSHA collect data in high-hazard workplaces at a higher rate than low-hazard workplaces. In the past, when agencies have taken Congressional funding and allocated it in ways not in line with what Congress wants, the following fiscal year additional language can be added to provide more specific direction. By appropriating funds to research in high-hazard workplaces, such as meatpacking plants, there will be less opportunity for employers to evade honest reporting.

### *C. Option 3: Oregon Grant Program*

Oregon OSHA receives funds from three sources: 1) 69% is funded by an assessment paid by employers on the premiums they pay

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<sup>110</sup> Relating to Overtime for Agricultural Workers; & Prescribing an Effective Date, HB 4002, 81st Leg. Assemb., Reg. Sess. (Or. 2022).

<sup>111</sup> JAMES V. SATURNO, MEGAN S. LYNCH, AND BILL HENIFF JR., CONG. RSCH. SERV., R42388, THE CONGRESSIONAL APPROPRIATIONS PROCESS: AN INTRODUCTION (2016).

<sup>112</sup> *Id.*

<sup>113</sup> H.R. 4502, 117th Congress, 1st Sess., (2021).

to their insurer for workers' compensation coverage; 2) 25% is funded by two grants from the U.S. Department of Labor OSHA; and 3) 6% is funded by civil penalties issued for violation of the Oregon Safe Employment Act.<sup>114</sup> Once a year, Oregon OSHA accepts grant applications for the development of innovative workplace safety and health training programs. Oregon OSHA has implemented different grant projects ranging from the development of safe lifting guidelines to an educational program for nurses to prevent ergonomic-related injuries.<sup>115</sup>

From 2010-2020 the Latino population in Oregon has grown 30%.<sup>116</sup> The rural counties, such as Morrow and Malheur, with agricultural processing plants saw the biggest increase in the state.<sup>117</sup> With a growing population of speakers whose second language is English, providing more resources to bridge language gaps will increase workplace safety. Oregon OSHA can implement a grant program that prioritizes hiring inspectors and other OSHA personnel to speak the same language as the employees they serve. The Act requires that those doing the inspections have an employee representative or a reasonable number of employees join them.<sup>118</sup> By having the individuals who conduct the on-site inspections speak the same language of the workers, workers will have a better chance of properly communicating health and safety concerns.

## VI. CONCLUSION

The failures of industrial agriculture during the COVID-19 pandemic have exposed life-threatening health disparities among migrant workers, thus furthering the need to enforce legislation that will safeguard a more humane food system that values the people providing essential services. Congress can act now by amending the statutory language within OSHA to require a licensed physician see all work-related injuries and to have the physician oversee reporting injuries to BLS and OSHA. This amendment will provide more

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<sup>114</sup> Morgan Romero & Celeste Ruiz, *In the Past Decade, Oregon's Latino Population Grew Three Times Faster Than the Rest of the State*, KGW8 (Oct. 1, 2021), <https://www.kgw.com/article/news/local/oregon-latino-population-growth/283-02174a9f-6932-4ad0-96cc-2694af68795e>.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> 29 U.S.C. § 657.

accurate data collection regarding how many injuries are taking place on the line, including the CTD's—one of the many long-term consequences of meatpacking. Congress can also allocate funds to the Department of Labor and mandate that the money is used for data collection issues regarding high-hazard workplaces through the appropriate funding process. A third and local solution would be to implement a grant program through Oregon OSHA that prioritizes hiring people who speak the same languages of the employees of the plants that are inspected.