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PaulMarie E. Bobb

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PaulMarie E. Bobb*

“Semper necessitas probandi incumbit ei qui agit,” meaning: “the necessity of proof always lies with the person who lays charges.”¹

On March 21, 2020, Jason Hargrove recorded a Facebook video vocalizing his frustration with the unsafe working conditions and lack of precautions taken by riders to help curb the spread of the novel coronavirus disease 2019 (“COVID-19”).² A week following this video, Hargrove, a city bus driver with the Detroit Department of Transportation, husband, and father of six, died from complications of COVID-19.³

In December 2019, the Coronavirus, an acute respiratory disease with the ability to spread among humans through respiratory transmission, was discovered in China.⁴ By March 2020, the World Health Organization (“WHO”) officially characterized the coronavirus outbreak as a pandemic of great public health concern.⁵ The COVID-19 Pandemic has led to the worst depression since the Great Depression and has caused economic and social disruption worldwide.⁶ A vast majority of states, through governors’ executive orders, instituted shelter-in-place orders, requiring people to avoid all nonessential outings and many businesses to temporarily close, causing many to work from home.⁷

* PaulMarie E. Bobb, Juris Doctor Candidate May 2021, Saint Thomas University College of Law, ST. THOMAS JOURNAL OF COMPLEX LITIGATION, Member. I dedicate this article to my grandmother, Sylvia Leriche, for having stressed the importance of education in her children and grandchildren. I also dedicate this article to my parents, Jean Paul and Marie Elie, who came to this country so that their children could have all the opportunities possible. Ultimately, I dedicate this article to my husband, Mark W. Bobb, Esq., for his continuous encouragement and support, which has brought me this far. To them all, I am forever thankful and hope to make them proud.

¹ See *Burden of Proof*, US LEGAL, <https://civilprocedure.uslegal.com/trial/burden-of-proof/>.

² See generally Timothy Bella, *Detroit Bus Driver Who Complained About a Coughing Passenger Dies of Coronavirus Days Later*, THE WASHINGTON POST (Apr. 3, 2020, 6:00 AM), <https://www.washingtonpost.com/nation/2020/04/03/detroit-bus-driver-coronavirus/>.

³ See Michael Levenson, *11 Days After Fuming About a Coughing Passenger, a Bus Driver Died From the Coronavirus*, THE NEW YORK TIMES (Apr. 4, 2020), <https://www.nytimes.com/2020/04/04/us/detroit-bus-driver-coronavirus.html>.

⁴ David S. Hui, *The continuing 2019-nCoV epidemic threat of novel coronaviruses to global health — The latest 2019 novel coronavirus outbreak in Wuhan, China*, ELSEVIER PUBLIC HEALTH EMERGENCY COLLECTION (Jan. 14, 2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7128332/>.

⁵ Corky Siemaszko, *Coronavirus outbreak labeled a pandemic by World Health Organization*, NBC NEWS (Mar. 11, 2020), <https://www.nbcnews.com/health/health-news/coronavirus-outbreak-labeled-pandemic-world-health-organization-n1155741>.

⁶ Gita Gopinath, *The Great Lockdown: Worst Economic Downturn Since the Great Depression*, INTERNATIONAL MONETARY FUND (Apr. 14, 2020), <https://blogs.imf.org/2020/04/14/the-great-lockdown-worst-economic-downturn-since-the-great-depression/>.

⁷ Grace Hauck et al., *‘Stay Home, Stay Healthy’: These states have ordered residents to avoid nonessential travel amid coronavirus*, USA TODAY (Mar. 21, 2020, 5:59 PM), <https://www.usatoday.com/story/news/nation/2020/03/21/coronavirus-lockdown-orders-shelter-place-stay-home-state-list/2891193001/>.

However, amidst this chaos as a nation in crisis, it became evident how much society depends on essential employees.⁸ An essential employee (or “essential worker”) “is a designated employee that is required to work during a business closure in order to meet operational requirements.”⁹ Essential workers can include those who work in emergency services, food and agriculture, healthcare, transportation, and government and community-based organizations.¹⁰

Many individuals, just as Hargrove, were deemed to be essential employees because their absence from work negatively impacted the health and safety of the cities they represent.¹¹ Nonetheless, while these essential employees have been required to work, many were not compensated for the many months they have had to work under these conditions. The United States Office of Personnel Management (“OPM”), through the Code of Federal Regulations (“CFR”) provides the wage schedules and rates for employees, in which it establishes the existence of a duty to apply Environmental Differential Pay (“EDP”) standards. These standards apply when a job involves unusually severe working conditions or unusually severe hazards.¹² The regulations provide that an employee entitled to EDP “shall be paid for hours in a pay status on the day on which he/she is exposed to the situation.”¹³ It also states that these employees who fit into the qualified EDP criteria are entitled to compensation that is equal to the percentage rate that is authorized by OPM for whichever category the hazard falls within.¹⁴

Like Hargrove, many essential workers, have performed work with or in close proximity to objects, surfaces, and/or individuals infected with COVID-19.¹⁵ Being exposed to surfaces, objects, and people who have been infected with COVID-19 poses a threat and risk of personal injury such as the incapability to work due to partial or complete loss of faculties, chronic disease, and death.¹⁶

The Centers for Disease Control and Prevention (“CDC”) determined COVID-19 meets the definition of *severe acute respiratory syndrome* and is, therefore, considered a “quarantinable communicable disease.”¹⁷ As of January 2021, more than 419,000 people in the United States have died from COVID-19.¹⁸ COVID-19 is said to be spread by the touching of infected objects or surfaces and by breathing in areas where an infected person has released droplets from their

⁸ Niccolo Guasti, *The plight of essential workers during the COVID-19 pandemic*, THE LANCET (May 23, 2020), [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(20\)31200-9/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)31200-9/fulltext).

⁹ *What is an Essential Employee?*, BETTERTEAM (Nov. 19, 2020), <https://www.betterteam.com/what-is-an-essential-employee>.

¹⁰ Celine McNicholas & Margaret Poydock, *Who are essential workers? A comprehensive look at their wages, demographics, and unionization rates*, ECONOMIC POLICY INSTITUTE (May 19, 2020, 11:25 AM), <https://www.epi.org/blog/who-are-essential-workers-a-comprehensive-look-at-their-wages-demographics-and-unionization-rates/>.

¹¹ Greg Jaffe & Annie Gowen, *The high price of keeping Detroit moving*, THE WASHINGTON POST (Apr. 13, 2020), <https://www.washingtonpost.com/graphics/2020/national/detroit-coronavirus/>.

¹² See 5 U.S.C. § 5543(c)(4); see also 5 C.F.R. § 532.511.

¹³ 5 C.F.R. § 532.511(b)(3).

¹⁴ 5 C.F.R. § 532.511(b)(1).

¹⁵ Jaffe & Gowen, *supra* note 11.

¹⁶ McNicholas & Poydock, *supra* note 10.

¹⁷ *Coronavirus Disease 2019 (COVID-19): Additional Guidance*, CHIEF HUMAN CAPITAL OFFICE COUNCIL (Mar. 7, 2020), <https://www.chcoc.gov/content/coronavirus-disease-2019-covid-19-additional-guidance>.

¹⁸ *Coronavirus Disease 2019, Cases in the US*, CENTERS FOR DISEASE CONTROL PREVENTION (Jun. 17, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>.

nose or mouth which are spread when a person with COVID-19 coughs or exhales.¹⁹ Contact with an infected object or surface may present a risk of transmission for “up-to several days” from the time the object or surface became infected.”²⁰

In order to understand whether government workers are entitled to any legal remedies as a result of unpaid wages/hazard pay, improper workplace safeguards, and any failure to implement reasonable working measures during the COVID-19 Pandemic, it is imperative to properly comprehend the different requirements.²¹ Any work which would cause the employee extreme physical discomfort and distress and is not adequately alleviated by protective devices is deemed to impose a physical hardship.²² Hazardous duty pay differentials are defined by the United States Department of Labor as “additional pay for performing hazardous duty or work involving physical hardship.”²³

The CFR provides that agencies shall pay eight percent (8%) hazard EDP when employees perform work with or in close proximity to “micro-organisms which involve death or chronic diseases,” the need for safety devices and equipment, as well as not having medical prophylactic procedures such as vaccines and antiserums.²⁴ Employees also are owed a four percent (4%) EDP when they are required to perform work in close proximity to “micro-organisms in situations for which the nature of the work does not require the individual to be in direct contact with primary containers of organisms pathogenic for man, such as culture flasks, culture test tubes, hypodermic syringes and similar instruments, and biopsy and autopsy material.”²⁵ Throughout the pandemic, Hargrove along with many of his friends and fellow public transport drivers, have had to perform work with or in close proximity to objects, surfaces, and individuals infected with COVID-19.²⁶

The predominant issue amongst many cases dealing with essential employees claiming a failure to receive hazard differential pay is the employee’s ability to identify significant workplace injuries as well as prove that their employer’s lack of safety practices is the reason they were exposed of some sort.²⁷ In 1980, Donald M. O’Neill (“O’Neill”) and other plaintiffs filed suit seeking EDP for periods when those payments were not made.²⁸ O’Neill contended that he and fellow employees were exposed to asbestos dust as a result of their employment which then entitled them to EDP.²⁹ The court in this case held that “employees bear the burden of proof of entitlement to EDP and that simply showing that an employee was exposed to asbestos dust does not make out a prima facie case of entitlement.”³⁰ This finding, in my opinion, likely allows employers to avoid

¹⁹ *Coronavirus Disease (COVID-19): How is it Transmitted?*, WORLD HEALTH ORGANIZATION (Apr. 17, 2020), <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/question-and-answers-hub/q-a-detail/q-a-coronaviruses>.

²⁰ *Id.*

²¹ 5 C.F.R. pt. 532, Appendix A to Subpart E (2020).

²² *Id.*

²³ *Hazard Pay*, U.S. DEPARTMENT OF LABOR, <https://www.dol.gov/general/topic/wages/hazardpay>.

²⁴ 5 C.F.R. pt. 532, Appendix A to Subpart E.

²⁵ *Id.*

²⁶ Jaffe & Gowen, *supra* note 11.

²⁷ Occupational Safety & Health Administration, *Occupational Injury and Illness Recording and Reporting Requirements*, UNITED STATES DEPARTMENT OF LABOR, https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_id=16312&p_table=FEDERAL_REGISTER.

²⁸ O’Neill v. United States, 797 F.2d 1576, 1578 (Fed. Cir. 1986).

²⁹ *See Id.* at 1583 (holding that “[e]mployees bear the burden of proof of entitlement to EDP and that simply showing that an employee was exposed to asbestos dust does not make out a prima facie case of entitlement.”).

³⁰ *Id.*

liability, regardless of whether or not they negligently exposed their workers and others to COVID-19, which would result to personal injury or death.³¹

As a result of this need to shift the burden, this note will discuss the following: (1) the Background of the Occupational Safety and Health Act; (2) the requirements of Environmental Differential Hazard Pay; (3) suggestions for the United States government to take the lead in protecting workers from hazardous exposures;³² and (4) finally, conclude with a summary of the goal set out in this note, which is to shift the burden from workers onto employers.

I. Occupational Safety and Health Act

The Occupational Safety and Health Act of 1970 (the “OSH Act”), administered by the Occupational Safety and Health Administration (“OSHA”), established standards to abide by as it relates to the safety and health of people who work in the private sector, state and local government (when state law permits), and federal government.³³ Congress affirmed the purpose and policy of this Act is “to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources.”³⁴ The idea behind the OSH Act was intended to deal with all aspects of health and safety in the workplace and has a strong focus on primary prevention of hazards.³⁵ It aims to promote and maintain a high degree of social, mental, and physical well-being as well as protect workers from being placed in unsafe working conditions. These unsafe working conditions are often labelled occupational hazards, which can include physical hazards, psychosocial hazards, chemical hazards, and biological hazards.³⁶ The OSH Act’s focus is based on three objectives:

(i) the maintenance and promotion of workers’ health and working capacity; (ii) the improvement of working environments and to work to become conducive to safety and health; and (iii) the development of work organizations and working culture in a direction which supports health and safety at work, and in doing so also promotes a positive social climate and smooth operation, which may enhance productivity of the undertakings.³⁷

The most important of the OSH Act’s policy rationales is the General Duty Clause.³⁸ This clause tasks employers with maintaining conditions or adopting practices reasonably necessary

³¹ See Andrew Kragie, *McConnell Wants Broad Liability Shield in Next COVID-19 Bill*, LAW360 (Apr. 27, 2020), <https://www.law360.com/articles/1267837/>; see also Susan Clark, *Implementing a National Return to Work Plan*, UNITED STATES CHAMBER OF COMMERCE (Apr. 13, 2020), <https://www.uschamber.com/coronavirus/implementing-national-return-to-work-plan>.

³² See generally O’Neill, 797 F.2d 1576.

³³ 29 U.S.C. § 651 (2020).

³⁴ *Id.*

³⁵ *Protecting Workers’ Health*, WORLD HEALTH ORGANIZATION (Nov. 30, 2017), <https://www.who.int/news-room/fact-sheets/detail/protecting-workers-health>.

³⁶ *What Are Occupational Hazards? Definition and Examples*, MARKET BUSINESS NEWS (Mar. 23, 2019), <https://marketbusinessnews.com/financial-glossary/occupational-hazards/#:~:text=Occupational%20hazards%20are%20risks%20of,result%20of%20doing%20their%20job>.

³⁷ NASSER ELAHI, INDUSTRIAL SAFETY MANAGEMENT 272 (2006).

³⁸ *Occupational Safety & Health Administration*, UNITED STATES DEPARTMENT OF LABOR, <https://www.osha.gov/Publications/about-osha/3302-06N-2006-English.html>.

and appropriate to protect workers on the job; becoming familiar with and complying with standards applicable to their establishments; and ensuring employees have and use personal protective equipment when required for safety and health.³⁹ In order to prove a violation of the General Duty Clause the following four elements must be established:⁴⁰ (1) the employer failed to keep the workplace free of a hazard to which employees of that employer were exposed; (2) the hazard was recognized; (3) the hazard was causing or was likely to cause death or serious physical harm; and (4) there was a feasible and useful method to correct the hazard.⁴¹ It must also be noted that a general duty citation must involve both the presence of a serious hazard and notice of the hazardous condition.⁴²

The citation requirements can render it extremely difficult for workers to meet or satisfy these elements. The four criteria, although considered a powerful tool to aid against workplace hazards, are extremely difficult to meet.⁴³ For example, in certain cases it is difficult to collect sufficient evidence to support workers claims and in other instances it is difficult to prove that the employer did not do enough, regardless of whether the employer did the bare minimum.⁴⁴

II. Environmental Differential Pay

The need for Environmental Differential Pay, used for federal wage system employees and Hazard Differential Pay, used for white-collar employees, occurs when the performance of hazardous duty or duty involving physical hardship requires an additional pay to be rendered to a worker.⁴⁵ The United States Code states “an employee shall be paid an environmental differential when exposed to a working condition or hazard that falls within one of the categories approved by the Office of Personnel Management.”⁴⁶ Employees are entitled to an EDP based on actual exposure and are required to be paid a minimum of one hour’s pay for the exposure.⁴⁷ When a hazardous duty is performed under circumstances in which an accident could result in serious injury or death, it qualifies them to receive additional pay for each day the employee was exposed to the hazard.⁴⁸ The United States Office of Personnel Management (“OPM”) defines hazardous duty as a “duty that may not in itself be hazardous, but causes extreme physical discomfort or distress . . . such as duty involving exposure to extreme temperatures for a long period of time, arduous physical exertion, or exposure to fumes, dust, or noise that causes nausea, skin, eye, ear, or nose irritation.”⁴⁹

³⁹ *Occupational Safety & Health Administration*, *supra* note 38.

⁴⁰ *Fields Operations Manual (FOM)*, UNITED STATES DEPARTMENT OF LABOR, <https://www.osha.gov/enforcement/directives/cpl-02-00-163/chapter-4>.

⁴¹ *Id.*

⁴² *Id.*

⁴³ William C. Schillaci, *General Duty Clause Violations: Proving Is Easier Said than Done*, EHS DAILY ADVISER (Oct. 24, 2018), <https://ehsdailyadvisor.blr.com/2018/10/general-duty-clause-violations-proving-is-easier-said-than-done/>.

⁴⁴ *Id.*

⁴⁵ *Environmental Differential Pay*, OFFICE OF HUMAN RESOURCES MANAGEMENT (Aug. 2020), <https://www.commerce.gov/hr/practitioners/compensation-policies/premium-pay/environmental-differential-pay>.

⁴⁶ 5 C.F.R. § 532.511(a)(1) (2020).

⁴⁷ *Id.*

⁴⁸ 5 C.F.R. § 550.902 (2020).

⁴⁹ *Id.*

The EDP provides that agencies are required to pay an eight percent (8%) environmental differential hazardous pay when employees perform work with or in close proximity to “micro-organisms which involves potential personal injury such as death, or temporary, partial, or complete loss of faculties or ability to work due to acute, prolonged, or chronic disease.”⁵⁰ According to the Legal Information Institute, “the use of safety devices and equipment, medical prophylactic procedures such as vaccines and antiserums and other safety measures do not exist or have been developed but have not practically eliminated the potential for such personal injury.”⁵¹ When employees perform work with or in close proximity with “micro-organisms in situations in situations for which nature of the work does not require the individual to be in direct contact with primary containers of organisms pathogenic for man” a four percent (4%) environmental differential hazardous pay is required.⁵²

Employees entitled to an EDP shall be paid an amount equal to the percentage rate authorized by the OPM for the category in which the working condition or hazard falls, multiplied by the rate.⁵³ Any employee entitled to an EDP on the basis of hours in a pay status is to be, “paid for all hours in a pay status on the day on which he/she is exposed to the situation.”⁵⁴ When an employer fails to pay an employee EDP, the employee is considered to have been unlawfully deprived of EDP and other reliefs.⁵⁵ The employer then is believed to have willfully and purposefully violated Title 5 of the Code of Federal Regulations and thus becomes liable to the employee for various amounts which, in most cases, has not been precisely determined.⁵⁶ It is then necessary for the employer to make available all employment and work records of the employee, being that they are in his possession.⁵⁷ Unfortunately, this and much more is difficult for the affected employees to procure.⁵⁸ In *O’Neill v. United States*, it was held that employees “seeking EDP entitlement must bear the burden of proof of their claims under ordinary principles of our jurisprudence.”⁵⁹

III. Essential Yet Exposed: Covid-19

As of April 28, 2020, the number of federal employees who have tested positive for COVID-19 has surpassed 10,000.⁶⁰ While most workers have been given the opportunity to telework, the same cannot be said for essential government workers.⁶¹ Many of the tasks that are expected of government workers cannot be performed remotely, forcing hundreds to thousands of federal

⁵⁰ 5 C.F.R. § 532.

⁵¹ United States Office of Personnel Management, *Federal Wage System: Nonappropriated Fund Employees 532-2* (1970).

⁵² 5 C.F.R. § 550.902.

⁵³ 5 C.F.R. § 532.511(b)(1).

⁵⁴ 5 C.F.R. § 532.511(b)(3).

⁵⁵ *Id.*

⁵⁶ *See* 5 U.S.C. § 5545(d); *see also* 5 U.S.C. § 5343(c)(4).

⁵⁷ Fair Labor Standards Act of 1938, 29 U.S.C. § 211 (2020).

⁵⁸ *Id.*

⁵⁹ *See O’Neill*, 797 F.2d at 1581 (stating no special circumstances are present here which warrant departure from the general rule).

⁶⁰ Eric Katz, *More Than 10,000 Federal Employees Have Contracted COVID-19*, GOVERNMENT EXECUTIVE (Apr. 28, 2020), <https://www.govexec.com/workforce/2020/04/more-10000-federal-employees-have-contracted-covid-19/164986/>.

⁶¹ *Id.*

workers to continue reporting to their workstations.⁶² Essential workers are the reason it is possible for the country to continue to function during the crisis, yet they are not being treated with dignity and respect.⁶³ The longer the COVID-19 Pandemic continues, the clearer it becomes that essential workers do not have the rights and protections they need and deserve.⁶⁴ Government workers have complained of insufficient protective supplies, equipment, and distancing policies.⁶⁵ The total number of positive cases within the federal workforce has more than quadrupled since early April.⁶⁶ At most offices and agencies, employees are instructed to continue to work regardless of having been exposed to the COVID-19 virus.⁶⁷

Because a country cannot effectively control COVID-19 without taking actions to limit the number of essential workers who catch and spread the virus through their constant interactions, the “White House has instructed agencies to develop ways to bring employees back to the office, though it advised top officials to follow the guidance of state and local leaders and public health officials.”⁶⁸ As of April 2020, some government agencies that have been severely affected include: Defense Department, 4,265 positive cases; Veterans Affairs Department, 1,633 positive cases; U.S. Postal Service, 1,606; State Department, with 2,800 possible exposures; Transportation Security Administration with 495 positive cases; Agriculture Department with 100 positive cases; Internal Revenue Service with 100 positive cases; Health and Human Services Department with 74 positive cases; Interior Department with 10 positive cases.⁶⁹ While these numbers may seem low, as of July 23, 2020, the United States had a total of 4,024,492 with 72,219 new cases and total deaths of 143,868 with 1,113 new deaths.⁷⁰

To prevent and reduce transmission among employees and in response to the vast number of essential workers being exposed, the CDC has provided a set of guidelines to help reduce the number of essential employees being exposed.⁷¹ The CDC states that it is possible for “businesses and employers [to] prevent and slow the spread of COVID-19 within the workplace.”⁷² It is encouraged that employers respond in a manner that takes into account the level of disease transmission in their communities and revise their plans accordingly.⁷³ The CDC also explains that, “[b]usiness operation decisions should be based on both the level of disease transmission in

⁶² Katz, *supra* note 60.

⁶³ David Madland et al., *How the Federal Government Can Protect Essential Workers in the Fight Against Coronavirus*, CENTER FOR AMERICAN PROGRESS (Apr. 8, 2020), <https://www.americanprogress.org/issues/economy/news/2020/04/08/482881/federal-government-can-protect-essential-workers-fight-coronavirus/>.

⁶⁴ *Id.*

⁶⁵ Katz, *supra* note 60.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ See Madland et al., *supra* note 63; see also Katz, *supra* note 60.

⁶⁹ Katz, *supra* note 60.

⁷⁰ *Cases, Data & Surveillance, Cases in the US*, CENTERS FOR DISEASE CONTROL PREVENTION (Jun. 24, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>.

⁷¹ *Guidance for Businesses and Employers Responding to Coronavirus Disease 2019 (COVID-19)*, CENTERS FOR DISEASE CONTROL PREVENTION (Dec. 31, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>.

⁷² National Center for Immunization and Respiratory Diseases (NCIRD) - Division of Viral Diseases, *Guidance for Businesses & Employers Plan, Prepare and Respond to Coronavirus Disease 2019*, CENTERS FOR DISEASE CONTROL PREVENTION (Jan. 4, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>.

⁷³ *Id.*

the community and your readiness to protect the safety and health of your employees and customers.”⁷⁴ The CDC directs and encourages businesses and employers to “coordinate with state and local health officials to obtain timely and accurate information to inform appropriate responses.”⁷⁵ In order to prevent and reduce the transmission among employees, the CDC suggests that monitoring all of the COVID-19 public health communications published by federal, state, and local governments will ensure that all workers have access to necessary COVID-19 information.⁷⁶ The CDC recommends that daily in-person or virtual health checks, such as symptoms and temperature checks, be taken of all employees, “in accordance with state and local public health authorities and, [where available,] occupational health services,” before these employees enter the workplace facility.⁷⁷

It is encouraged that employers identify where and how workers might be exposed to COVID-19 at work.⁷⁸ Employers are expected to do a thorough “hazard assessment to determine if workplace hazards are present, or are likely to be present, and determine what type of controls or personal protective equipment [“(PPE)”) are needed for specific job duties.”⁷⁹ Employers are required to encourage workers to wear face masks at work in order to cover and contain the wearer’s respiratory droplets and help protect their co-workers and members of the public who come in to contact with them.⁸⁰ However, even with the guidelines, the spike of positive COVID-19 cases continues to rise and many essential workers are not compensated for their risks.⁸¹ Essential workers face health and safety emergencies due to inadequate safety standards and massive shortage of personal protective equipment.⁸² The Center for American Progress states that “America cannot realistically keep social distancing going in a safe way if these essential workers are not afforded better conditions, pay, and benefits.”⁸³

The Center for American Progress (“CAP”) suggests that essential workers have access to a set of rights and protections that will allow them to work safely and effectively during a public health emergency.⁸⁴ The seven core policies suggested by CAP are as follows: (1) safety standards to protect them from airborne infectious diseases; (2) additional compensation for the risks they are taking; (3) paid family and medical leave that they can use to care for themselves or their families; (4) access to affordable health care if they become sick; (5) quality child care so they can go to work while many schools and centers are closed; (6) strong enforcement of workplace

⁷⁴ NCIRD, *supra* note 72.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ Patrick T. Collins & Annmarie Simeone, *Daily Health Checks Under Governor Murphy’s Executive Order 192*, EMPLOYMENT LAW BLOG (Nov. 3, 2020), <https://norrisclaughlin.com/njelb/2020/11/03/daily-health-checks-governor-murphys-executive-order-192/>.

⁷⁸ *Guidance on Preparing Workplaces for COVID-19*, UNITED STATES DEPARTMENT OF LABOR, <https://www.osha.gov/Publications/OSHA3990.pdf>.

⁷⁹ *Recommended Practices for Safety and Health Programs*, UNITED STATES DEPARTMENT OF LABOR, <https://www.osha.gov/shpguidelines/hazard-identification.html>.

⁸⁰ NCIRD, *supra* note 72.

⁸¹ Madland et al., *supra* note 63.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Jacob Leibenluft & Ben Olinsky, *Protecting Worker Safety and Economic Security During the COVID-19 Reopening*, CENTER FOR AMERICAN PROGRESS (Jun. 11, 2020), <https://www.americanprogress.org/issues/economy/news/2020/06/11/486146/protecting-worker-safety-economic-security-covid-19-reopening/>.

standards; and (7) access to unions to help implement safety protections and compensation standards above the minimum.⁸⁵

The Safety Standards require OSHA to issue an emergency standard in order to protect front line workers from airborne infectious diseases just as it requires protections against the spread of bloodborne illnesses.⁸⁶ It entails OSHA issuing “requirements that employers implement protective measures for all essential workers, including Transportation Security Administration workers, direct-care workers, first responders, pharmacists, grocery store workers, and other employees at essential places that remain open during health emergencies, as leading lawmakers and labor groups have called for.”⁸⁷ Guidelines and trainings for how these essential workers can minimize the possibility of exposing their loved ones at home should be of top priority. The United States “has a responsibility to protect the health and financial stability of these individuals and their families.”⁸⁸ Many believe that “Congress did too little to protect essential workers in the CARES Act.”⁸⁹

The Additional Compensation states that, “essential workers should be paid at least the prevailing wage rate that government contractors must pay, or \$15 per hour, whichever is higher.”⁹⁰ It also recognizes that essential workers should receive a hazard pay supplement.⁹¹ Thus far, the Senate Democrats have proposed “\$25,000 for workers earning less than \$200,000 per year and at \$5,000 for those earning more than \$200,000.”⁹² The CAP suggests that pay for essential workers should be raised for essential workers, not by cutting unemployment benefits but by raising salaries.⁹³

The Paid Family and Medical Leave is proposed because of the risk that essential workers are bringing to themselves and their loved ones.⁹⁴ The CAP suggests the Families First Coronavirus Response Act (“FFCRA”) for qualifying workers to receive up to “two weeks of short-term paid leave if they are sick or self-quarantining or caring for a family member, as well as an additional 10 weeks of paid child care leave to care for a child whose school or place of care is closed.”⁹⁵

The Access to Affordable Health Care is to encourage a no-cost testing site and treatment for COVID-19.⁹⁶ This would guarantee that workers get the testing and treatments needed once they suspect or are sure of the possible exposure.⁹⁷

⁸⁵ Madland et al., *supra* note 63.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Adie Tomer & Joseph W. Kane, *How to protect essential workers during COVID-19*, BROOKINGS (Mar. 31, 2020), <https://www.brookings.edu/research/how-to-protect-essential-workers-during-covid-19/>.

⁸⁹ *Id.*

⁹⁰ Madland et al., *supra* note 63.

⁹¹ *Id.*

⁹² Alexander Bolton, *Senate Democrats Propose \$25,000 Hazard-Pay Plan for Essential Workers*, THE HILL (Apr. 7, 2020), <https://thehill.com/homenews/senate/491547-senate-democrats-propose-25000-hazard-pay-plan-for-essential-workers>.

⁹³ Madland et al., *supra* note 63.

⁹⁴ *Id.*

⁹⁵ *Families First Coronavirus Response Act: Employee Paid Leave Rights*, WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, <https://www.dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave>.

⁹⁶ Madland et al., *supra* note 63.

⁹⁷ *Id.*

The Quality Child Care is proposed because CAP believes millions of essential workers, including front-line health workers' ability to work is dependent on access to childcare.⁹⁸ CAP states, "[w]ith schools and child care centers across the country closing to comply with social distancing guidelines, there is a significant need for emergency child care to serve children of these essential workers."⁹⁹ Having this option alleviates a lot of the stress the essential workers encounter whilst dealing with having to work.¹⁰⁰

The Strong Enforcement of Workplace Standards explains that, unfortunately, "even before the current crisis, evidence suggested that violations of legal workplace standards were widespread."¹⁰¹ In an effort to improve standards, it proposed that essential workers be permitted to take action on their own, or even on behalf of the government, against companies that violate their rights; when courts rule in their favor, they should receive back pay, damages, attorneys' fees, and injunctive relief.¹⁰²

Unions for essential workers and Collective Bargaining Agreements help protect union workers that speak up against unsafe conditions make them critical for ensuring that safety protections are actually followed.¹⁰³ Addressing the current public health crisis this country currently faces requires many actions which are not rapidly available.¹⁰⁴ However, it is unjust to place people in harm's way without, at a minimum, providing them with adequate rights and protections, especially with a court system that adds to the difficulty of being properly compensated.

IV. Conclusion

EDP is the only way in which an employee who has been exposed to a hazard, physical hardship or unusually severe working conditions can receive compensation. In order for this employee to get compensated, the employee must show credible evidence that they were actually exposed to a qualifying hazard through the performance of his or her assigned duties. Unfortunately, if the government simply shows that their safety precautions reduced the element of hazard to a less than significant level of risk, then the employee does not qualify.¹⁰⁵

Thus, the predominant issue of EDP stems from the current system that allows employers to avoid liability because they have the upper hand. This analysis proposes that the burden be shifted to the employer, so that they have to prove they provided a safe working environment for their essential employees and prevented their exposure. It proposes that changes be brought in

⁹⁸ Rasheed Malik et al., *The Coronavirus Will Make Child Care Deserts Worse and Exacerbate Inequality*, CENTER FOR AMERICAN PROGRESS (Jun. 22, 2020), <https://www.americanprogress.org/issues/early-childhood/reports/2020/06/22/486433/coronavirus-will-make-child-care-deserts-worse-exacerbate-inequality/>.

⁹⁹ *Operating Child Care Programs-Supplemental Guidance*, CENTERS FOR DISEASE CONTROL PREVENTION (Dec. 31, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/guidance-for-childcare.html>.

¹⁰⁰ *Id.*

¹⁰¹ Madland et al., *supra* note 63.

¹⁰² *Id.*

¹⁰³ Celine McNicholas et al., *Why Unions are Good for Workers—Especially In a Crisis Like COVID-19 - 12 Policies That Would Boost Worker Rights, Safety, and Wages*, THE ECONOMIC POLICY INSTITUTE (Aug. 25, 2020), <https://www.epi.org/publication/why-unions-are-good-for-workers-especially-in-a-crisis-like-covid-19-12-policies-that-would-boost-worker-rights-safety-and-wages/>.

¹⁰⁴ Madland et al., *supra* note 63.

¹⁰⁵ *See* 5 C.F.R. § 550.904-550.906.

order to ensure that employers are held responsible, accountable, and prevented from absconding their obligation to their employees.