At Least As Effective: OSHA, the State Plans, and Divergent Worker Protections from COVID-19

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Abstract:

The federal Occupational Safety and Health Administration (OSHA) sets nationwide standards for workplace health and safety. But private sector workers in twenty-one states and Puerto Rico rely on a state agency (State Plan) for their enforcement. Those State Plans must remain “at least as effective” as OSHA. Are they? Despite their key role in protecting workers in many states, few legal scholars have tried to answer that question. It takes on renewed significance due to the worker health crisis caused by the COVID-19 pandemic.

This Article develops a framework for understanding and evaluating the federal-state system of worker protection and OSHA’s responsibility to monitor State Plans for continued effectiveness. It argues that during the COVID-19 pandemic, the system failed to provide the uniform baseline of protection that Congress sought to achieve when it created OSHA. Rather, a new empirical analysis derived from FOIA requests demonstrates that workers received different levels of protection based on where they lived. Some states exceeded the federal baseline, while others fell far below it. This Article proposes reforms to strengthen and unify the nationwide system of workplace health and safety enforcement before the next emergency.

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INTRODUCTION

As COVID-19 first spread throughout the United States, doctors and nurses, meatpackers and grocery clerks, bus drivers and delivery workers continued working in person, at considerable risk of illness or death. While most Americans sheltered in place, taking care to avoid contact with others, these workers risked exposure to an unknown virus every day. Their workplaces became the scenes of viral outbreaks, and it was widely reported that some employers failed to take the necessary steps to stop the disease.1 In meatpacking plants, for example, frigid conditions, shoulder-to-shoulder workstations, and inadequate personal protective equipment combined to put workers at particular risk.2 Yet data assembled by the federal Occupational Safety and Health Administration (OSHA) suggest meatpacking plants were no anomaly; workplace outbreaks were common in a wide range of establishments, such as health care facilities, restaurants, retail stores, and nursing homes.3

Faced with unhealthy conditions, thousands of workers sought help from OSHA and its state-level counterparts (State Plans). This Article presents the first comprehensive look at how the federalist worker protection system fared during the COVID-19 pandemic.4 This Article also aims to provide a framework for


4 The most similar studies are the following: The Department of Labor’s Inspector General released an audit of federal and state enforcement related to COVID-19 reviewing data from Feb. 1, 2020, to Oct. 26, 2020. This paper’s findings are generally consistent with the audit, which is discussed throughout. DEP’T OF LAB., OFF. OF INSPECTOR GEN., NO. 19-21-003-10-105, COVID-19:
understanding State Plan effectiveness and how OSHA should monitor their performance during an emergency.

Workplace safety in the United States is regulated through a hybrid federal-state system. OSHA is the federal agency responsible for setting and enforcing national standards for workplace safety. OSHA conducts enforcement in twenty-nine states, the District of Columbia, and four territories. Twenty-one states and Puerto Rico enforce federal and state workplace safety laws within their borders through State Plans. By statute, these State Plans must be “at least as effective” as OSHA. OSHA is mandated to monitor the State Plans to ensure they are.

Prior scholarship on OSHA and COVID-19 has analyzed and criticized the federal response to the pandemic, characterizing the response as weak and highlighting the government’s failure to protect essential workers, such as meatpackers, who are disproportionately members of minority and immigrant groups. The State Plans, meanwhile, have been overlooked, despite their central role in the enforcement and rulemaking scheme.

In short, this Article finds that OSHA did not sufficiently protect workers

8 See Modesitt, supra note 7.
under its jurisdiction from the virus. During the first year of the pandemic, the agency refused to promulgate binding rules, conducted limited on-site inspections, and issued few penalties. State Plans were all over the map. Certain State Plans grabbed hold of their authority and promulgated specific, binding COVID-19 regulations that clarified employers’ responsibilities and enabled vigorous enforcement. Other State Plans relied on existing rules and conducted little or no enforcement, leaving millions of workers with less protection than they would have received under OSHA jurisdiction. Though Congress passed the Occupational Safety and Health Act of 1970 (OSH Act) with the goal of ensuring that workers nationwide were protected from hazards in their workplaces, this aim was not achieved during the pandemic. OSHA did little to encourage or monitor the State Plans, and the federalist structure resulted in protections that varied substantially based on where a worker lived.  

The Article draws on a new empirical analysis performed by the author of data obtained from OSHA through the Freedom of Information Act (FOIA). FOIA requests by the author produced data from February 1, 2020 through March 17, 2021 on all inspections relating to COVID-19 by OSHA or a State Plan, including who was inspected, cited, and penalized and what regulations were used. This Article also relies upon federal statutes, regulations, guidance documents, case law, Federal Register notices, and interviews.  

Part I describes the history and structure of OSHA as a cooperative federalism program and seeks to clarify the meaning of “at least as effective.” The Article argues that the standard refers to a four-component assessment of a State Plan’s organization, standards, enforcement, and resources, providing the tools for evaluating OSHA and the State Plans’ performance during the pandemic. This Part also considers how OSHA monitors State Plans and the problems that the agency has faced in ensuring continued compliance.  

Part II examines the federal-state OSHA program in the context of the COVID-19 pandemic. It argues that OSHA had a duty to protect workers from COVID-19, a health hazard that created serious risks in the workplace. This duty was not substantially limited by the U.S. Supreme Court’s recent decision staying the Biden Administration OSHA’s controversial vaccine-or-test mandate because that decision does not question OSHA’s authority to promulgate targeted rules protecting workers from COVID-19, at least in higher-hazard industries with more common interventions, such as masking, distancing, and ventilation.  

OSHA was provided an opportunity to comment on the findings of this Article. In an email, an agency spokesperson wrote: “At this time, we do not have a comment to provide. We appreciate your interest in academic work to strengthen our system of occupational health and safety.” Email from Office of Public Affairs, Occupational Safety & Health Admin., to author (Dec. 14, 2022) (on file with author).  

Nat’l Fed’n of Indep. Bus. v. Dep’t of Labor, Occupational Safety & Health Admin., 142 S.
Furthermore, it does not affect the State Plans’ ability to promulgate rules under state law. Part II then describes the Article’s empirical methodology and compares the responses offered by OSHA and the State Plans using the framework developed in Part I. At the level of standards, OSHA did not promulgate an emergency standard during the first year of the pandemic, instead relying on existing standards and guidance documents that were poor enforcement tools. Most State Plans followed OSHA during the first year of the pandemic, but six State Plans promulgated emergency standards, using their authority to exceed the federal minimum. The data show that State Plans were on average far more active than OSHA, conducting 4.95 times as many inspections and citing 5.33 times as many businesses per covered establishment than OSHA during the first year of the pandemic. Yet, the State Plans were not uniformly more vigorous. A few State Plans conducted the lion’s share of enforcement, while several State Plans conducted barely any enforcement. The difference among State Plans was much starker than between OSHA states. On a per-establishment basis, the standard deviation of businesses cited was 7.25 times higher among State Plans than among states under OSHA control. This Part further uses a calculation of the deterrent effect of enforcement as a proxy for effectiveness, finding that some states were more, and others less, effective enforcers than OSHA. Part III argues that standards are OSHA’s best tool for monitoring State Plans during an emergency. Because State Plans are required to adopt them, or an alternative that is “at least as effective,” OSHA’s monitoring turns on ensuring

Ct. 661, 665-66 (2022) (per curiam) [hereinafter NFIB v. OSHA] (“Where the virus poses a special danger because of the particular features of an employee’s job or workplace, targeted regulations are plainly permissible.”); see COVID–19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61,402 (Nov. 5, 2021) [hereinafter OSHA Vaccine ETS]; COVID–19 Vaccination and Testing; Emergency Temporary Standard, 87 Fed. Reg. 3,928, 3,928 (Jan. 26, 2022) (withdrawing emergency rule). 14 The data presented here derive from Freedom of Information Acts request filed with OSHA for records of all state and federal OSHA inspections related to COVID-19 from February 1, 2020 to March 17, 2021. Hereinafter, these data will be referred to in footnotes as FOIA Data. Due to jurisdictional coverage gaps, the analysis focuses exclusively on private sector employees and excludes government workers. The author lacks a formal data science background, and the analysis of that dataset is relatively rudimentary. The author believes this study reflects important and so far, overlooked elements of the agency’s response to the pandemic. She hopes it will encourage future political scientists and legal scholars to conduct further analysis. The comparison noted in the cited text is drawn from standardized averages of all State Plan and OSHA enforcement. That is, the author summed the private sector inspections conducted and citations issued during this period for State Plans and OSHA, then divided by the number of private business establishments in each group. The state figure was then divided by the federal figure. See Section II.D.2 tbls. 1-3, infra, for summary and state-by-state figures. 15 FOIA Data. See Section II.D.2 tbls. 1-3, infra, for summary and state-by-state figures.
standards have been adopted into state law—an easier task than monitoring complicated enforcement outputs or outcomes. An empirical analysis of State Plan use of emergency standards demonstrates how effective they can be during an emergency. Finally, Part IV offers recommendations for reforming the OSH Act to improve nationwide uniformity and vigor during an emergency.

I. THE FEDERAL-STATE SYSTEM OF WORKPLACE PROTECTION

Congress passed the Occupational Safety and Health Act of 1970 (OSH Act) to address severe disparities in state-level workplace protections. At that time, annual state expenditures on worker safety ranged from 2 cents to $2.11 per nonagricultural worker. In states with the most robust programs, the annual death rate from work accidents was 1.9 per 10,000 workers, while states with poor programs had rates of 11 per 10,000 workers, or 500 percent higher. With the OSH Act, Congress sought to elevate baseline protections and bring uniformity to the system nationwide. For “[c]learly, the life of a worker in one state is as important as a worker’s life in another state, and uniform standards must be required to protect all workers from dangerous substances.”

Congress’s solution was to empower the U.S. Department of Labor—and its component Occupational Safety and Health Administration (OSHA)—to promulgate and enforce workplace health and safety regulations. However, Congress also allowed states to retain power over this area if they created a program that was “at least as effective” as OSHA. The hybrid system held the promise of capturing the best and avoiding the worst of devolution. It enabled states to be creative and more protective than OSHA while prohibiting them from falling below a federal floor. This Part describes the State Plan system under the OSH Act and provides a framework for understanding when State Plans are “at least as effective” as OSHA—and the dimensions on which they can fall short. Providing this background is key to assessing the federalist system during the pandemic.

This Part also seeks to contribute to the OSHA literature. Despite the central role of State Plans in worker protection, legal scholarship on this topic is thin. Most scholars studying OSHA have focused on the federal agency and its standard-setting, enforcement practices, and relationship to Congress, business groups, and the labor movement. To a degree, this makes sense: State Plans tend to enforce

17 Id. at 7-8.
20 Id. § 18(c)(2), 29 U.S.C. § 667(c)(2).
21 The literature on OSHA is vast, but the following books and articles are emblematic of the focus on federal OSHA. Thomas O. McGarity & Sidney A. Shapiro, Workers at Risk (1993);
federal regulations, rather than designing their own, and OSHA’s influence in the market and as a monitor makes it the lead player. However, it misses the key enforcement role of State Plans and the potential they exhibit for worker safety regulation amid ossified federal rulemaking and hostile federal courts.

The most comprehensive scholarship on State Plans was published in the 1970s and 1980s. One important line of thought explored OSHA’s control over the State Plans and whether the threat of substituting OSHA for a State Plan controlled their behavior. While this literature provides an interesting historical perspective, it does not reflect the thirty years of experience since. In the past twenty years, State Plans have attracted the most attention from political scientists and economists comparing the effectiveness of State Plans and OSHA with respect to injury, illness, and fatality rates. This Article goes beyond the recent research by theorizing the legal framework for State Plans and considering the effectiveness of individual states within the system. Political scientist Gregory Huber’s book *The Craft of Bureaucratic Neutrality* offers the most sustained, recent discussion of the State Plans. Professor Huber’s book analyzes and contextualizes data from the State Plans and OSHA, reaching conclusions about the comparative resources and effectiveness of each. This Article builds on many of his insights.

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22 See Mintz, supra note 16.


A. Striving for a Uniform Baseline of Protection

Congress was motivated to pass the OSH Act because many states had failed to protect American workers from health and safety risks. In 1970, Congress recognized the “on-the-job health and safety crisis [as] the worst problem confronting American workers,” resulting in the annual deaths of 14,500 workers.27 Problems were not evenly distributed across the country. Though states began regulating workplace hazards and toxins during the Industrial Revolution, “[t]here were too many holes in the piecemeal system and numerous hazards were left uncontrolled.”28 To the extent some states regulated, “these laws were more often window dressing than anything substantive.”29 One state regulated a toxic chemical, while another would not. Data were muddled by poor reporting of injuries and illnesses among the least regulated states.30 Some state agencies also lacked rulemaking authority and enforced penalties too low to be meaningful.31 And states that did enforce risked undermining their competitive status compared to other states.32 The rise in state workers’ compensation did little to improve the situation. Workers’ compensation provided minimal economic incentive for employers to improve workplace safety or health protocols. The schemes provided even less reason for employers to improve health protocols since only an estimated 5 percent of people suffering from workplace-related diseases received benefits.33

The House and Senate Committees that considered the bill concluded that a “comprehensive, nationwide approach” was needed.34 The OSH Act sought to reduce the number of workplace injuries and fatalities “through the development and administration, by the Secretary of Labor, of uniformly applied occupational safety and health standards.”35 But the bill provided a continued role for states. States would be encouraged “to take over entirely and administer their own programs for achieving safe and healthful jobsites for the Nation’s workers”36—so long as they provided assurances that the program would be well resourced and administer standards that were “at least as effective” as those promulgated by OSHA. OSHA set the floor for workplace protections; states had to meet it.

29 Lloyd Meeds, A Legislative History of OSHA, 9 GONZ. L. REV. 327, 328 (1974) (Meeds was a member of the House Committee on Education and Labor and one of the conferees on the OSH Act).
31 Mintz, supra note 16, at 8.
32 MacLaury, supra note 28, at 18.
33 Mintz, supra note 16, at 9; MacLaury, supra note 28, at 19.
36 Id.
Congressional committee reports provide little insight into why Congress permitted states to retain their own programs. The reports speak of a need for uniformity and improved standards, not state-level “laboratories of democracy.” But state-level programs are inherently subject to variation. According to OSHA officials who wrote about the Act near the time of passage, the answer probably lies in pragmatism. First, worker safety was long an area of classic state police power authority, and many states did not want to shut down their programs and defer to the federal government. Relatedly, some members of Congress favored states’ rights and the value of concentrating power closer to the people. Second, it was “a question of manpower.” At the time of passage, there were about 2,000 state-level inspectors, and Congress was not prepared to take away so many jobs or ramp up the federal program to a similar scale. And finally, there was the issue of cost—allowing states to run their own programs would ultimately be less expensive than a fully federal program.

The OSHA system works like this: by default, the OSH Act and any regulations promulgated by OSHA preempt state worker safety rules. In default states, OSHA runs an agency office that enforces federal regulations. Because OSHA regulations are preemptive, states subject to federal enforcement may not pass workplace health and safety laws on subjects already regulated by OSHA.

However, any state may continue to regulate issues for which OSHA does not have a standard, such as second-hand tobacco smoke. Because OSHA did not promulgate a standard on COVID-19 during the first year of the pandemic, states were able to regulate workplace safety protocols, such as masking.

If states wish to vary from existing OSHA rules, they must establish a “State Plan”—a state worker safety agency that meets federal standards. Today twenty-one states (and Puerto Rico) maintain their own plans, while another six states and the U.S. Virgin Islands cover only state and local government workers. States

37 Id. at 4, 6, 18 (noting that in a “state-by-state approach, the efforts of the more vigorous states are inevitably undermined by the shortsightedness of others”); H.R. Rep. No. 91-1291, at 15 (1970) (discussing the need for “uniform standards” and “uniform reporting”).

38 John Stender, An OSHA Perspective and Prospective, 26 LAB. L.J. 71, 73 (1975) (“The Act would not have passed the Congress if provisions for state plans had not been included.”).


40 Id. at 746.

41 Id.

42 Id.


44 OSH Act § 18(a), 29 U.S.C. § 667(a); see Empire State Rest. & Tavern Ass’n, Inc. v. New York State, 360 F. Supp. 2d 454 (N.D.N.Y. 2005) (finding state indoor smoking regulation not preempted by OSHA standards).

45 OCCUPATIONAL SAFETY & HEALTH ADMIN., supra note 5.
operating their own programs are clustered in the West, Mid-West, Atlantic South, and Appalachia; they do not correlate neatly along political or industrial lines. Rather, as Professor Huber has shown, State Plans are associated with states having strong business interests and weak labor unions, as well as states with strong labor unions and weak business interests. “In the aggregate, state adoption is likely both in states where enforcement is likely to surpass OSHA’s and where (in the absence of federal oversight) it is likely to be less stringent than OSHA’s.” This suggests State Plans will represent the strongest and weakest enforcers in the system.

46 States and territories with comprehensive plans covering private and public sector workers are Alaska, Arizona, California, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, and Wyoming. States and territories with limited plans covering public sector workers are Connecticut, Illinois, Maine, Massachusetts, New Jersey, New York, and the Virgin Islands.

47 HUBER, supra note 26, at 183.
48 Id.
Map of OSHA and State Plan Coverage

Source: Occupational Safety and Health State Plan Association

B. Making State Plans “At Least As Effective” as OSHA

The tether that connects State Plans to OSHA is the requirement that State Plans remain “at least as effective” as OSHA. In principle, this should ensure that State Plans provide a baseline of protections for workers while avoiding the trade-offs classically associated with state enforcement. However, “effective” is not defined in the statute, and the concept has led to policy debates about State Plan effectiveness and OSHA monitoring. This Section aims to flesh out the measures of State Plans through the structure set forth by the Act and provide background on the historical characteristics of the State Plans and their relationship to OSHA. The Act provides for, and OSHA tends to evaluate, State Plans along four axes: plan organization, standards, enforcement, and resources. First, a State Plan may only be approved if it has certain structural components, such as rulemaking authority. State Plans must, second, adopt standards and, third, conduct enforcement that is “at least as effective in providing safe and healthful employment and places of employment” as OSHA’s program. Fourth, State Plans must maintain adequate resources to carry out fully effective enforcement of their approved program. Then it is OSHA’s role to conduct a “continuing evaluation of the manner in which each State . . . is carrying out such plan.” This framework of features enables comparisons between State Plans and OSHA.

1. Plan Organization

Plan organization is at the center of maintaining effective State Plans. Essentially, State Plans are required to have certain structural components in place before they can receive approval to operate. This is key, because OSHA has maximum leverage before approval is granted. To obtain approval to run a program, a state must designate an agency to oversee the program and provide it with authority to make rules and conduct enforcement. For example, the state agency must have authority to enter and inspect workplaces. The state must also

state plan in August 2022, and is not included in this map.

50 HUBER, supra note 26, at 172. But see NOBLE, supra note 21, at 97 (arguing that devolution to the states was motivated by business interests who believed they could capture the regulatory apparatus).


53 Indeed, OSHA was very stringent when the states began submitting their plans immediately after passage of the OSH Act, causing ten states to withdraw their proposals because the agency rejected their initial submissions. Thompson, supra note 23, at 65.

54 OSH Act § 18(c)(1)-(2), 29 U.S.C. § 667(c)(1)-(2).

55 Id. § 18(c)(3), 29 U.S.C. § 667(c)(3).
“provide for the development and enforcement of safety and health standards . . . [which] are or will be as effective in providing a safe and healthful employment and places of employment as the standards promulgated” by the federal program.\textsuperscript{56} OSHA has provided substance to this legal standard through regulations that require, among other things, that the state agency will make inspections “in response to complaints, where there are reasonable grounds to believe a hazard exists.”\textsuperscript{57} State plans must also provide for “prompt and effective standards setting actions for the protection of employees against new and unfor[e]seen hazards, by such means as the authority to promulgate emergency temporary standards.”\textsuperscript{58}

2. Standards

Once a State Plan is established, it must keep up with federal rulemaking by adopting federal standards or state standards that are “at least as effective in providing safe and healthful employment and places of employment” as OSHA’s.\textsuperscript{59} OSHA has declined to issue guidance on the meaning of “at least as effective,” claiming it would be neither “practicable [n]or advisable” due to the “very broad variety of contexts” in which it arises.\textsuperscript{60} The statutory text suggests that the rule must have an equal impact on injury or illness rates. But by referring to “places of employment,” the statute suggests regulations must also create an equally safe workplace, which may not be reduced to statistical outcome measures. Thus, it may be relevant that certain protections—physical and procedural—are in place, even if their impact on worker safety outcomes cannot be measured.

States bear the burden of demonstrating the effectiveness of their alternative rules.\textsuperscript{61} Rejection is extremely rare. The only recent example involved an Arizona fall protection standard for residential roofers. In 2011, Arizona adopted a law providing for fall protection where roofers were more than fifteen feet above the ground, even though OSHA’s standard protected workers at six feet.\textsuperscript{62} OSHA

\begin{itemize}
\item \textsuperscript{56} Id. § 18(c)(2), 29 U.S.C. § 667(c)(2).
\item \textsuperscript{57} 29 C.F.R. § 1902.4(c)(2)(i).
\item \textsuperscript{58} 29 C.F.R. § 1902.4(b)(2)(v).
\item \textsuperscript{60} Changes to State Plans: Revision of Process for Submission, Review and Approval of State Plan Changes, 67 Fed. Reg. 60,123 (Sept. 25, 2002).
\item \textsuperscript{61} Id.
\end{itemize}
determined this standard was less effective and rejected it.\textsuperscript{63} After OSHA threatened to reconsider the State Plan’s approval, the state withdrew its standard and adopted OSHA’s.\textsuperscript{64} More difficult questions may arise when a State Plan approaches regulation from a different angle entirely.

Most State Plans have adopted federal standards, where they exist, with some amendments or supplemental rules.\textsuperscript{65} A recent survey found that four states—California, Michigan, Oregon, and Washington—were responsible for the “vast majority” of all unique health and safety standards.\textsuperscript{66} But allowing states to exceed federal standards enables them to regulate issues that OSHA has not yet approached. California Division of Occupational Safety and Health (Cal/OSHA) has long been recognized for its innovative State Plan and often promulgates standards ahead of OSHA. For example, prior to the pandemic, Cal/OSHA already had a standard to prevent the transmission of respiratory diseases in health care settings.\textsuperscript{67} The state also has standards pertaining to heat exposure and ergonomics,\textsuperscript{68} which are not regulated by OSHA. Regulation by numerous State Plans on an issue has led OSHA to regulate issues nationwide.\textsuperscript{69}

3. Enforcement

State Plans must provide for enforcement that is “at least as effective in providing safe and healthful employment and places of employment” as OSHA’s enforcement.\textsuperscript{70} Enforcement consists of programmed inspections, as well as inspections responding to accidents, complaints, and government agency referrals. State Plan officials have historically conducted more inspections, but were less

\textsuperscript{63} Arizona State Plan for Occupational Safety and Health, 80 Fed. Reg. 6,652 (Feb. 6, 2015).
\textsuperscript{64} Arizona State Plan for Occupational Safety and Health, 84 Fed. Reg. 35,989 (July 26, 2019).
\textsuperscript{67} CAI. CODE REGS. tit. 8, § 5199.
\textsuperscript{68} CAL. CODE REGS. tit. 8, § 3395 (heat exposure for outdoor workers); CAL. CODE REGS. tit. 8, § 5110 (ergonomics).
\textsuperscript{69} For example, OSHA has recently announced it will begin a rulemaking on excessive heat, an issue on which California, Minnesota, Oregon, and Washington have already developed standards. Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings, 86 Fed. Reg. 59,316 (Oct. 27, 2021).
\textsuperscript{70} OSH Act § 18(c)(2), 29 U.S.C. § 667(c)(2).
likely to issue a citation, and penalties were lower than OSHA’s.71 For example, a study of construction industry enforcement found that State Plan inspections tend to be more frequent, and enforcement less punitive, than OSHA’s.72

As in the case of standards, OSHA has not defined “equally effective” in this context. Scholars have studied the effectiveness of OSHA and State Plan enforcement in two ways—through the lenses of outcomes and inputs. Outcomes are injury, illness, and fatality rates; a State Plan can be understood as being “at least as effective” as OSHA if workers in a State Plan are not more likely to be hurt, sickened, or killed on the job than they would be in an OSHA state.73 Inputs are metrics of agency activity, such as inspections conducted or penalties issued. A State Plan is as effective under this model if, for example, it conducts as many inspections as OSHA on a per-employer basis. The statutory text suggests that equally effective enforcement should result in comparable outcomes, but that State Plans and OSHA need not take identical approaches. Yet, it also suggests similar workplace conditions may be relevant. At least when outcomes are difficult to measure, it is reasonable to rely on standardized enforcement inputs as a proxy for deterrence and thereby effectiveness. OSHA’s Inspector General has pressed the agency to focus on outcome metrics.74 The agency has pushed back, arguing that self-reported injury and illness rates, changes in the level of economic activity in the economy, and small sample sizes in certain states limit the usefulness of outcome-based comparisons.75


72 See Morantz, supra note 25, at 190 (noting that “[a]lthough state-plan officials conduct more inspections than their federal counterparts, the probability of an inspected company receiving a penalty is markedly higher in OSHA. Most important—regardless of whether one focuses on the penalty initially imposed or the penalty collected after postinspection bargaining has taken place between the firm and the inspector—fines are dramatically lower in state-plan states”).

73 The states with the highest average workplace fatality rates from 2010 through 2019 were Wyoming, North Dakota, Alaska, Montana, West Virginia, South Dakota, Louisiana, Mississippi, Arkansas, and Oklahoma, with only Wyoming and Alaska being State Plans. U.S. BUREAU LAB. STAT., CENSUS OF FATAL OCCUPATIONAL INJURIES, https://www.bls.gov/iif/oshwc/cfoi/staterates.htm [https://perma.cc/2UKW-K4V9]. Because fatalities are relatively infrequent and associated with certain dangerous industries, a better metric would be injuries and illnesses. Unfortunately, studies have shown those figures are seriously underreported, in ways that provide a distorted picture of workplace safety nationwide. Indeed, Mendeloff and Burns found a negative correlation between workplace injuries and fatalities in the construction sector among states. John Mendeloff & Rachel Burns, States with Low Non-Fatal Injury Rates Have High Fatality Rates and Vice-Versa, 56 AM. J. INDUS. MED. 509, 517-18 (2013). States in the Southeast tend to have low reported injury rates and high reported fatality rates, where Alaska, Arizona, Hawaii, Iowa, Maine, Montana, Nevada, Oregon, Washington, and Wisconsin have low fatality rates and high injury rates. Id. at 513-14.

74 OSHA STATE EFFECTIVENESS AUDIT, supra note 51, at 3-7 (Mar. 31, 2011).

75 Id. at 27-28 (response of David Michaels, Assistant Secretary, OSHA, to audit findings).
Studies have demonstrated mixed results when comparing OSHA and the State Plans along these lines. In a paper comparing outcomes in the construction sector, Professor Alison Morantz found that fatality rates were generally lower in State Plans, but rates of nonfatal injuries were higher. She theorized that the difference could be caused by the underreporting of nonfatal injuries to OSHA, possibly due to concerns about federal inspections or differing “regulatory styles.” Professor Gregory Huber has compared the inputs of state and federal enforcement, which he describes as vigor. Vigor is calculated as a function of agency resources (staffing) multiplied by agency stringency (the likelihood that an inspection will result in a violation). Huber found that while OSHA is almost always more stringent than State Plans, it is less vigorous than most State Plans, which tend to have more inspectors.

Each approach has its value. On the one hand, the outcome-based approach is useful because it is guided by the ultimate goal of the program: to reduce the number of injuries, illnesses, and deaths that result from work. Where reliable data are available, it is probably the best, most faithful approach. On the other hand, the input-based approach recognizes the problems with measuring workplace injuries and illnesses, but insists that regulations are present and enforcers monitor workplaces. Accepting the premise that enforcement has a deterrent effect, inputs provide an indirect way of measuring the outcomes of the program. For a novel situation such as the COVID-19 pandemic, the latter approach is appropriate, because it enables some measurement and comparison of programs when full analysis of the outcomes of certain interventions may be years away.

4. Resources

The final requirement is that a State Plan must give “satisfactory assurances” that it will provide the “adequate funds” and “legal authority and qualified personnel necessary for the enforcement” of workplace standards. The D.C. Circuit Court of Appeals has interpreted this as a requirement for State Plans to be staffed at such a level as will achieve “fully effective enforcement.” “Once the standards were set there were to be assurances the state would have the resources ‘necessary to do the job.’” The D.C. Circuit case has resulted in benchmarks for state agency staffing. Those benchmarks have persisted through the present, meaning State Plans tend to be better staffed than OSHA. The federal agency has

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76 Morantz, supra note 25, at 207.
77 Id. at 199, 194-96.
78 HUBER, supra note 26, at 184-96.
80 AFL-CIO v. Marshall, 570 F.2d 1030, 1033 (D.C. Cir. 1978); see 29 C.F.R. § 1902.3(h).
81 AFL-CIO v. Marshall, 570 F.2d at 1037.
82 Id. at 194-95 (demonstrating that from 1993 to 1996 all State Plans had
recently been underfunded to a degree that limits appropriate staffing.\textsuperscript{83}

However, funding and staffing of State Plans vary significantly from state to
state. State funding is set by a formula intended to create parity among the states,
but which is not sensitive to state performance or changing needs.\textsuperscript{84} OSHA
supplies up to 50 percent of the funding for each State Plan.\textsuperscript{85} Some states fund
their programs at exactly the level required to obtain the match, while others
supplement. According to Occupational Safety and Health State Plan Association,
OSHA provided states with $108 million in annual funding for enforcement
programs. States contributed an additional $232 million, which includes their 50
percent match.\textsuperscript{86} The “overmatch” is not evenly distributed among the state plans.\textsuperscript{87}
A report from 2011 indicates that six states with comprehensive state plans
contributed only the mandatory 50 percent, while fifteen State Plans (including
Puerto Rico) overmatched. Washington, Oregon, and Alaska spent the most per
worker, while the South Carolina, Indiana, and Arizona State Plans spent the
least.\textsuperscript{88}

\begin{center}
\textbf{C. Monitoring State Plan Effectiveness}
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The OSH Act requires the federal agency to “make a continuing evaluation of
the manner in which [the State] is carrying out such plan.”\textsuperscript{89} Whenever OSHA
finds that “in the administration of the State plan there is a failure to comply
substantially with any provision of the State plan,” it must withdraw approval and
reassert jurisdiction.\textsuperscript{90} This statutory provision implies a duty on the part of OSHA
to ensure not only that the statutes and regulations passed by the state meet the
federal requirements, but that the State Plan’s enforcement is as effective. Yet
OSHA’s levers of control are limited after a State Plan is approved. The agency
has two real tools to correct problems: public investigations and threats of plan

\textsuperscript{83}Michaels & Wagner, supra note 59. In 2019, coming into the pandemic, OSHA had the
lowest number of inspectors in forty years, just 862. Berkowitz, supra note 59.

\textsuperscript{84}Is OSHA Undermining State Efforts To Promote Workplace Safety?: Hearing Before the H.
Subcomm. on Workforce Protections, Comm. on Educ. & the Workforce, 112th Cong. 45 (2011)
[hereinafter Is OSHA Undermining State Efforts].

\textsuperscript{85}OSHA STATE EFFECTIVENESS AUDIT, supra note 51, at 20 (originally, OSHA would match
state dollars 1:1, but later OSHA lacked sufficient funds to meet the state contributions).

\textsuperscript{86}OCUPATIONAL SAFETY & HEALTH STATE PLAN ASS’N, supra note 49 (including 23(g)
funding and 21(d) funding).

\textsuperscript{87}Is OSHA Undermining State Efforts, supra note 84, at 61.

\textsuperscript{88}This figure is derived from the State Plan spending numbers disclosed in Is OSHA
Undermining State Efforts, id., at 61, compared with 2019 U.S. Census Bureau estimates of the
working population.

\textsuperscript{89}OSH Act § 18(f), 29 U.S.C. § 667(f).

\textsuperscript{90}Id.
revocation. OSHA cannot reduce a State Plan’s funding or, in most cases, directly intervene in state enforcement.

Certain high-profile scandals raised questions about the adequacy of State Plan enforcement. In 1991, an OSHA investigation following a deadly cooking fire at a North Carolina chicken plant revealed that the State Plan had never inspected the plant during its eleven years of operation.\textsuperscript{91} Moreover, it demonstrated that OSHA had permitted the state to maintain an agency with insufficient resources to conduct adequate inspections.\textsuperscript{92} More recently, a newspaper investigation into a series of construction worker deaths at the Las Vegas Strip revealed that Nevada officials had failed to issue citations that met the seriousness of the incident or follow up to ensure hazards were abated.\textsuperscript{93} The investigation determined that state inspectors were not properly trained and did not target locations where serious hazards occurred.\textsuperscript{94} Somehow, OSHA missed this in its reviews.

Issues have also arisen with the more mundane updating of state standards in line with federal law. For example, in 2015, Congress passed a law raising the maximum OSHA penalties.\textsuperscript{95} To remain as effective, State Plans were required to adopt the same, with annual increases according to the Consumer Price Index. Some states have been reluctant to follow suit: Maryland \textit{still} has not adopted the penalty adjustments,\textsuperscript{96} and North Carolina\textsuperscript{97} and Arizona\textsuperscript{98} have only acted within the last year.

OSHA seeks to prevent and remedy these issues by regularly monitoring State Plans. Whenever OSHA adopts a new standard, each State Plan must adopt the same standard or one that is equally effective, and OSHA tracks this.\textsuperscript{99} OSHA also meets with state officials on a quarterly basis and investigates public complaints

\begin{footnotesize}
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\item \textsuperscript{91} Huber, supra note 26, at 87.
\item \textsuperscript{92} Id.
\item \textsuperscript{93} Nevada OSHA Hearing, supra note 71, at 17-18 (Report of Jordan Barab, Acting Assistant Secretary, OSHA).
\item \textsuperscript{94} Id.
\item \textsuperscript{97} Occupational Safety & Health Admin., FY 2021 Comprehensive Federal Annual Monitoring and Evaluation (FAME) Report, North Carolina Department of Labor, Occupational Safety and Health Division, at 17, [https://www.osha.gov/sites/default/files/2022-08/north-carolina-fy-2021-comprehensive-fame-report.pdf [https://perma.cc/7LYR-LVUZ].
\item \textsuperscript{98} Arizona State Plan for Occupational Safety and Health; Proposed Reconsideration and Revocation; Reopening of Comment Period; Postponement of Public Hearing, 87 Fed. Reg. 50,026 (Aug. 15, 2022).
\item \textsuperscript{99} 29 C.F.R. § 1902.4(b)(ii).
\end{itemize}
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about State Plan performance. Each year, OSHA issues each State Plan a Federal Annual Monitoring and Evaluation (FAME) Report, which states whether the program is “at least as effective” as OSHA.

Where a major issue comes to light, investigations provide a mechanism for accountability. After the Las Vegas construction scandal was exposed, OSHA conducted a comprehensive review of the state program, and a Congressional committee held a public hearing about the Nevada situation and the efficacy of State Plan oversight. The leader of Nevada OSHA testified before the committee that it was “committed to change.” In addition, OSHA can threaten to revoke Plan approval. This is a reasonably powerful threat, but one OSHA seldom makes. OSHA is disincentivized to do this more often, since follow-through would require establishing and paying for the full cost of a state program. Furthermore, the process of withdrawing approval is highly demanding and requires formal administrative hearings. OSHA has never taken this final step of revocation.

In 2014, OSHA threatened to reconsider the approval of Arizona’s plan after the state refused to implement an equally effective fall protection standard. OSHA withdrew its proposal in 2019 after the state adopted the federal standard. More recently, in April 2022, OSHA threatened again to revoke Arizona’s approval following the state agency’s refusal to implement the Biden Administration’s emergency standard for COVID-19, among other alleged failings over the past decade. The threat seems to have worked: since the April 2022 notice, Arizona has made changes, including passing a statute to raise minimum penalties and authorizing the state agency to adopt an emergency standard when either the state agency or OSHA determines that a grave danger is presented. In August 2022, OSHA postponed a hearing on the Plan reconsideration due to the changes implemented by the state.

101 Id. at 72-77.
102 See, e.g., Nevada OSHA Hearing, supra note 71.
103 Id. at 28.
104 Huber, supra note 26, at 215.
105 29 C.F.R. § 1955.
Both of these steps are burdensome for the agency—not only must OSHA expend agency resources, it also must expend serious political clout. But the greatest challenge to ensuring the effectiveness of State Plans is that it turns squarely on OSHA’s willingness to adopt standards and conduct vigorous accountability measures. As set forth above, State Plan effectiveness is measured by the performance of OSHA. Where OSHA is ineffective in its own enforcement and standard setting, it sets a lower bar for the states. Likewise, where OSHA is less vigorous in enforcing its program, it may be less energetic in monitoring and policing the State Plans. This Article does not purport to assess OSHA’s effectiveness in all cases; others have done so—comprehensively and critically. Nor does it purport to argue that the COVID-19 response is necessarily indicative of the overall health of the agency and the federalist system. This was a unique crisis, different in scale than any that OSHA had previously sought to regulate. Nonetheless, assessing the OSHA response to COVID-19 illuminates what can occur if the federal agency is weak—states go in their own directions, offering more and less protection, much like the system that Congress sought to leave behind in 1970 with the passage of the OSH Act. Recommendations that follow from this experience suggest ways that a revitalized OSHA can monitor the State Plans and elevate national performance in case of another emergency.

II. DIVERGENT PROTECTIONS FROM COVID-19

The federalist nature of the OSHA system shaped the protections workers received from COVID-19. This Part demonstrates that OSHA offered one response during the first year of the pandemic: relatively weak enforcement of existing standards. State Plans offered varying responses: certain states, such as California and Washington, aggressively enforced existing and novel regulations to protect workers from COVID-19. Other states, such as Wyoming, North Carolina, and Iowa, relied on existing standards and enforced them with even less vigor than OSHA. In the first year of the pandemic, OSHA did not ensure that all states remained as effective as OSHA. The result was that workers received disparate levels of protection because of where they lived.

This Part proceeds as follows. First, it argues that OSHA has a duty to protect workers from COVID-19. Second, it assesses the political and legal constraints on OSHA’s activity during the first year of the pandemic, including the Supreme Court’s ruling on OSHA’s authority in 2021. Third, this Part lays out the empirical methodology in the article. Finally, this Part compares the responses of OSHA and the State Plans. The assessment builds on the four-part framework of State Plan effectiveness developed in Section I.B—structure, standards, enforcement, and resources. Because the State Plans’ structure preexisted the pandemic, the latter

110 See McGarity & Shapiro, supra note 21.
three elements supply the appropriate axes on which to evaluate the plans. In an emergency such as the COVID-19 pandemic, OSHA and the State Plans should be compared based on the standards they promulgated pursuant to the hazard and the degree to which they enforced them. The proceeding discussion focuses mainly on standards and enforcement. It finds that the approaches differed dramatically among states, with some being more effective than OSHA and many being less.

A. OSHA’s Duty to Protect Workers from COVID-19

In passing the OSH Act, Congress was uniquely focused on protecting workers from diseases they might develop in the workplace. A Senate Report described the “field of occupational health” as “particularly bleak, and, due to the lack of information and records, it may well be considerably worse than we currently know.” Accordingly, the statute directs OSHA to promulgate and enforce standards “reasonably necessary or appropriate to provide a safe or healthful employment and places of employment.”

OSHA has acted on its authority over health-related workplace risks over time. For example, the agency promulgated standards limiting the allowable levels of “dangerous chemicals and dusts” that cause respiratory diseases and cancer. OSHA has also regulated worker exposure to infectious diseases. In 1991, the agency promulgated a rule protecting health care workers from bloodborne pathogens. Later during the H1N1 (Swine) Flu outbreak in 2009, OSHA issued a directive to regional offices instructing them to enforce existing standards to protect health care workers from the virus. The agency also broadly mandates cleanliness in the workplace to ensure employees are not unnecessarily exposed to unsanitary, disease-causing conditions.

Whether OSHA’s responsibility to protect workers from health risks extended to COVID-19 was debated during the pandemic. Conservatives and business groups argued that COVID-19 was a ubiquitous risk that was not sufficiently job-related to fall under OSHA’s purview. Liberals and worker advocates argued that the risk was job-related because people were exposed in their workplaces, and most people could not choose not to go to work. The U.S. Supreme Court weighed in on this question in National Federal of Independent Businesses v. Department of Labor, Occupational Safety and Health Administration. There, business groups

113 McGARTY & SHAPIRO, supra note 21, at 13.
114 Berg, supra note 21, at 1373 n.32.
115 OCCUPATIONAL SAFETY & HEALTH ADMIN., CPL-02-02-075, ENFORCEMENT PROCEDURES FOR HIGH TO VERY HIGH OCCUPATIONAL EXPOSURE RISK TO 2009 H1N1 INFLUENZA (Nov. 20, 2009).
and states challenged the agency’s authority to promulgate a rule requiring employees of large employers to get vaccinated against COVID-19 or wear a mask and submit to weekly testing.\textsuperscript{117} The Court found that the challengers to the rule were likely to succeed on the merits because a sweeping vaccine mandate was beyond OSHA’s statutory authority.\textsuperscript{118} However, the Court affirmed that OSHA has significant power to protect workers from COVID-19—and, going forward, other emergent risks and pandemics. After explaining why this rule was unlawful, the Court stated that its opinion did not question OSHA’s authority to “regulate occupation-specific risks related to COVID-19. Where the virus poses a special danger because of the particular features of an employee’s job or workplace, targeted regulations are plainly permissible.”\textsuperscript{119}

Having the power to protect workers from COVID-19, OSHA also had the responsibility to do so. In passing the OSH Act, Congress took over and preempted an area of traditional state authority after deeming the existing scheme deficient. This maneuver implies that Congress both sought to create a coherent national scheme\textit{ and} to actively protect workers from unnecessary workplace hazards. This is not to say that private parties have a general claim to sue OSHA for failure to address the pandemic—although unions and workers made viable claims that OSHA was required to conduct enforcement responsive to imminent dangers\textsuperscript{120} and issue emergency standards.\textsuperscript{121} But the Act does suggest the agency is responsible for workers’ health, and should be held accountable by Congress and the public. OSHA protection relating to COVID-19 was particularly important because workers’ compensation schemes and the OSH Act tend to displace any private right of action to secure a safe workplace.\textsuperscript{122} In the face of a global pandemic, OSHA and the State Plans had a duty to protect people from COVID-19 at work.

\textbf{B. Methodology}

How did OSHA fulfill its duty to workers during the pandemic? This Article seeks to answer that question for OSHA and the State Plans using the framework put forth in Part I, a review of agency actions and regulations, and an original empirical analysis. The empirical analysis is based on two FOIA requests filed with OSHA in 2021 and 2022. The first request sought data on all inspections relating to COVID-19 that resulted in a violation (Violations Request). The second

\begin{itemize}
\item \textsuperscript{117} NFIB v. OSHA, 142 S. Ct. 661 (2022) (per curiam).
\item \textsuperscript{118} Id. at 664-65.
\item \textsuperscript{119} Id. at 665-66.
\item \textsuperscript{120} Jane Does v. Scalia, 530 F. Supp. 3d 506 (M.D. Pa. 2021).
\item \textsuperscript{121} In re AFL-CIO, No. 20-1158, 2020 WL 3125324 (D.C. Cir. June 11, 2020) (per curiam).
\end{itemize}
request sought data on all inspections, irrespective of their outcome (Inspections Request). In response to these requests, OSHA provided spreadsheets exported from their Integrated Management Information System, which OSHA and the State Plans use to track enforcement inputs. The data in each request cover inspections opened from February 1, 2020 to March 17, 2021. Each spreadsheet contains fifty-five fields, including inspection number, inspecting office code, establishment name, ownership type, inspection dates, inspection type, standard cited, penalty assessed, and case status at the time of export. The Inspections Request included 8,584 entries, corresponding to all inspections conducted relating to COVID-19. The Violations Request included 7,703 entries, corresponding to all violations issued during inspections relating to COVID-19. An important note: not every violation in the dataset relates to COVID-19. When an inspector visits an establishment, they may encounter and cite other safety and health hazards, which are included in the dataset. Because the dataset did not include a description of the hazards cited, it was not possible to exclude secondary violations from the dataset.

To facilitate a comparison of OSHA with individual State Plans, the author matched the FOIA sheets with a reference dataset of inspection office names and codes supplied by OSHA. By matching the inspection office codes from the main sheets, it was possible to associate each inspection and violation with a state or OSHA office. The author also used U.S. Census data to standardize across states. To better understand the industries where enforcement took place, the violations dataset was further matched with the North American Industry Classification System codes. Bringing these datasets together facilitated comparisons along state and industry lines.

The Inspection and Violation Requests covered inspections and violations for private and public sector workplaces. The author limited her analysis to private sector workplaces to enable a better one-to-one comparison between OSHA and the State Plans.123 The author also excluded the small amount of federal auxiliary enforcement that OSHA conducts in State Plans over limited industries and federal enclaves.124

An important limitation of this study is recognizing that OSHA and the State Plans was just one part of the national response to COVID-19. States and municipalities issued thousands of different rules, many of which affected workplaces. Mask mandates, for example, were a common local intervention that

123 State Plans must cover state and local government workers, where OSHA is not permitted to do so. This has resulted in six states adopting State Plans solely to regulate government workers. Likewise, only OSHA can inspect federal workplaces, resulting in a small number of federal inspections in comprehensive State Plan states.

124 This auxiliary enforcement was included in Table 5, infra, which looks exclusively at federal data.
protected workers from each other and from customers. State and local governments also conducted enforcement, often through health department inspectors. Analyzing the state responses, which took place under the auspices of non-OSHA agencies, was beyond the feasible scope of the research for this Article. However, it does not undermine this project, since OSHA and the State Plans have an independent responsibility to protect worker safety, regardless of local government efforts. It is no answer to the problems raised in this Article that other state agencies tried to fill the void left by lacking OSHA enforcement. Preemptive OSHA regulations also had the unique potential to establish uniform protections nationwide and resolve the disparate protections offered state-by-state.

C. OSHA’s Response

During the first year of the pandemic, the Trump Administration’s OSHA chose a policy of leniency and flexibility over regulatory standards and enforcement as a means of addressing the COVID-19 pandemic in workplaces. Indeed, a report by the Department of Labor’s Inspector General found that “OSHA’s enforcement activities did not sufficiently protect workers from COVID-19 health hazards. As a result, there is a heightened risk that workers suffered unnecessary exposure to the virus.” As will be argued more fully in Part III below, OSHA’s decision not to issue an emergency standard also likely resulted in weaker enforcement among State Plans. Because OSHA had a responsibility to protect workers from COVID-19 and establish a meaningful baseline of nationwide protection, failure to issue a standard during the first year violated the agency’s duty to protect workers from COVID-19.

1. Standards

OSHA had the power to protect workers from COVID-19 by applying existing regulations or drafting new ones. During the Trump Administration, the agency chose to rely on existing regulations and extensive nonmandatory guidance rather than issue emergency standards. A top OSHA official, Loren Sweatt, told a Congressional committee that the guidance-based approach “allowed the agency a more nimble response to the ever-changing understanding of the virus.”

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Guidance is easier to update than regulations, she argued, and could be more specifically tailored to different industries.\textsuperscript{128} However, guidance is also nonbinding, meaning it cannot directly support the issuance of violations and penalties. Moreover, the guidance was often drafted to make compliance easier for employers rather than to enhance protection for workers. And it did little to facilitate the enforcement of violations.

OSHA’s toolbox going into the pandemic looked like this. First, OSHA had the General Duty Clause (GDC), which functions like a catch-all tort standard that OSHA can use when it lacks a specific standard to capture the violation. Every covered employer has a general duty to “furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious bodily harm to his employees.”\textsuperscript{129} Despite its broad sweep, the GDC is notoriously difficult to enforce.\textsuperscript{130} OSHA also had personal protective equipment standards, which require employers to supply and properly fit respirators where employees are exposed to hazardous agents, including viruses.\textsuperscript{131} These standards are immediately applicable to health care and certain manufacturing facilities, but lack general applicability for COVID-19. OSHA also had a rule requiring employers to keep records of workplace illnesses and deaths, which the agency interpreted to include COVID-19 contracted at work.\textsuperscript{132}

OSHA also had authority to issue an emergency temporary standard (ETS) for COVID-19.\textsuperscript{133} OSHA is required by law to issue an ETS if the agency “determines (A) that 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) that such emergency standard is necessary to protect employees from danger.”\textsuperscript{134} These standards allow OSHA to respond quickly to a new threat without following the usual and lengthy notice-and-comment procedures that take the agency nearly eight years to complete on average.\textsuperscript{135} Like permanent standards, State Plans must

\textsuperscript{128} Id.
\textsuperscript{130} See Emergency Petition for a Writ of Mandamus at 18-21, In re AFL-CIO, No. 20-1158 (D.C. Cir. filed May 18, 2020) (internal quotations omitted), mandamus denied, 2020 WL 3125324 (D.C. Cir. June 11, 2020) (per curiam); Section III.A, infra.
\textsuperscript{132} 29 C.F.R. § 1904.
\textsuperscript{133} OSH Act § 6(c), 29 U.S.C. § 655(c).
\textsuperscript{134} Id. § 6(c)(3), 29 U.S.C. § 655(c)(1).
\textsuperscript{135} U.S. GOV’T ACCOUNT. OFF., NO. 12-330, WORKER SAFETY AND HEALTH: MULTIPLE CHALLENGES LENGTHEN OSHA’S STANDARD SETTING (2012).
follow by adopting the emergency standards or issuing their own standards that are at least as effective. The statute provides that an emergency standard must be replaced by a permanent rule within six months, although OSHA has never tried to extend an emergency rule past this point.\textsuperscript{136}

OSHA declined to issue any emergency standards during the first year of the pandemic. Sweatt stated that existing tools could address the hazard of COVID-19 without an ETS.\textsuperscript{137} “Moreover, attempting to permanently address workplace exposure to SARS-CoV-2 based on the evolving information that is currently available to the agency could have counterproductive consequences, and would deprive the agency of the flexibility that it needs to respond to new information during the current pandemic.”\textsuperscript{138} That decision was opposed by labor groups, with the AFL-CIO calling it “an abuse of agency discretion so blatant and of ‘such magnitude’ as to amount to a clear ‘abdication of statutory responsibility.’”\textsuperscript{139} The federation of labor unions petitioned the D.C. Circuit Court of Appeals for a writ of mandamus ordering OSHA to issue an emergency standard.\textsuperscript{140} The unions claimed an ETS was “necessary” to protect working Americans exposed to the “grave danger” of coronavirus, because OSHA’s existing standards did not mandate the kind of precautions most likely to prevent transmission, such as physical distancing and isolation.\textsuperscript{141} The D.C. Circuit deferred to the agency’s discretion and denied the petition.\textsuperscript{142}

OSHA instead issued non-binding guidance.\textsuperscript{143} The agency’s initial March 2020 guidance documents encouraged employers to assess the risk facing their workplace, adopt engineering and administrative controls, and supply personal protective equipment.\textsuperscript{144} OSHA viewed health care workers and mortuary workers

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\textsuperscript{136} OSH Act § 6(c)(3), 29 U.S.C. § 655(c)(3).
\textsuperscript{137} Letter from Loren Sweatt, Principal Deputy Assistant Secretary, OSHA, to Richard Trumka, President, AFL-CIO, at 1-2 (May 29, 2020), https://www.passnational.org/images/PDFs/COVID-19/OSHAMay292020ResponseToAFL.pdf [https://perma.cc/7VJJ-MXK8] [hereinafter Sweatt Letter].
\textsuperscript{138} Id. at 5.
\textsuperscript{139} Emergency Petition for a Writ of Mandamus, supra note 130, at 5.
\textsuperscript{140} Id. The American Federation of Teachers and other unions also sought mandamus from the Ninth Circuit to force the agency to move forward on its abandoned infectious disease standard. Petition for Writ of Mandamus, In re Amer. Fed. Teachers v. OSHA, No. 10-73203 (9th Cir. filed Oct. 29, 2020). That case was not decided on the merits, and the case was closed after President Biden took office.
\textsuperscript{141} Emergency Petition for a Writ of Mandamus, supra note 130, at 18-19.
\textsuperscript{142} In re AFL-CIO, No. 20-1158, 2020 WL 3125324, at *1 (D.C. Cir. June 11, 2020) (per curiam).
\textsuperscript{143} See Modesitt, supra note 7, at 203-24 (providing a comprehensive critique of OSHA’s policy response).
\end{flushleft}
as the highest risk, suggesting ventilation and full respirator use, where possible. For lower-risk workers, OSHA recommended mere monitoring. OSHA would later issue more specific, industry-level guidance documents. For example, OSHA issued guidance that encouraged but did not require meatpackers to create a COVID-19 assessment and control plan, implement physical distancing and barriers, and “consider modifying” sick leave policies to ensure workers were not penalized for staying home if they had COVID-19, among other interventions.\footnote{145} OSHA’s guidance in other areas tended to reduce employer obligations rather than elevate them.\footnote{146} For example, in light of the “difficulty making determinations about whether workers who contracted COVID-19 did so due to exposures at work,”\footnote{147} OSHA interpreted recordkeeping requirements to require minimal reporting of COVID-19 cases, a decision that limited the agency’s ability to track outbreaks.\footnote{148}

In sum, the Trump Administration’s OSHA issued no enforceable standards during the first year of the pandemic, even though standards were the main way that the 1970 Congress expected OSHA to protect workers from hazards. Instead, it reduced employer obligations and issued nonmandatory guidance. These decisions had far-reaching implications: not only did they apply to workers in OSHA states, but they also set a low baseline for State Plans.

\footnote{145} Occupational Safety & Health Admin. & Ctrs. for Disease Control & Prevention, Meat and Poultry Processing Workers and Employers (July 9, 2020). The choice to issue guidelines over rules and the guidelines themselves have been criticized. See House Meatpacking Report, supra note 2, at 3; Yearby, supra note 10, at 45-49.

\footnote{146} In anticipation of N95 respirator mask shortages, for example, OSHA stated that it would not enforce the fit-testing requirement if employers were using certified National Institute for Occupational Safety and Health respirators and making a “good-faith effort to comply.” Occupational Safety & Health Admin., Temporary Enforcement Guidance—Healthcare Respiratory Protection Annual Fit-Testing for N95 Filtering Facepieces during the COVID-19 Outbreak (Mar. 14, 2020), https://www.osha.gov/lawsregs/standardinterpretations/2020-03-14 [https://perma.cc/2EBS-3L7L].


\footnote{148} While employers were required to record work-related COVID-19 cases, they were not required to report them to OSHA unless (a) the employee was hospitalized within twenty-four hours of a work-related exposure or (b) the employee died within thirty days of an exposure. Frequently Asked Questions: Reporting, Occupational Safety & Health Admin., https://www.osha.gov/coronavirus/faqs#reporting [https://perma.cc/G7A4-FLDJ] (last visited Mar. 3, 2023). This standard is a poor fit for COVID-19, since most people are not hospitalized within a day of exposure. Hospitalization tends to occur from three to ten days after symptom onset. Christel Faes et al., Time Between Symptom Onset, Hospitalisation and Recovery or Death: Statistical Analysis of Belgian COVID-19 Patients, 2020 Int’l J. Env’t Rsch. & Pub. Health 7560. See Dep’t of Lab., Off. of Inspector Gen., supra note 126 (noting that OSHA lacked complete data on workplace spread of COVID-19 due to the lacking reporting standard).
These policies should be understood in the context of the Trump Administration’s approach to regulation in general and during the pandemic. President Trump entered office promising to “deconstruct[] the administrative state” by rolling back regulations and reducing funding for federal agencies. Before the pandemic began, the OSHA inspectorate reached its lowest level since the 1970s, and key leadership positions sat vacant. In this deregulatory posture, OSHA stopped work on an airborne infectious disease standard that would have applied to COVID-19 in health care institutions. Trump also heralded himself as pro-business and issued an executive order encouraging agencies to honor their good faith efforts to comply with regulations during the pandemic. It has been reported that he was cozy with industry too, and that their priorities, particularly the meatpacking industry’s, influenced the Administration.

But this approach cannot be entirely reduced to Democratic-Republican politics. Little changed in the first six months of the Biden Administration. On his first day in office, President Biden issued an executive order demanding OSHA issue revised guidance within two weeks, review enforcement and target violations putting large numbers of workers at risk, and decide whether an ETS was warranted by March 15, 2021. But wavering support for mandates and the promise of vaccines lessened the sense of urgency and called into question whether a “grave danger” would persist much longer. The new Administration again


151 Id.


issued guidance documents, which experts said had more teeth than the earlier advisory documents, but which did not create mandatory obligations.

The Biden Administration finally implemented emergency standards in mid-2021, including the vaccine and health care standards. In June 2021, OSHA issued an ETS covering health care workers, while quietly giving up a plan to issue an ETS for all workers. In September, OSHA promulgated an ETS requiring employers to mandate vaccination or weekly testing for their workers. The health care standard, which set requirements for health screenings, personal protective equipment, ventilation, physical distancing, and barriers, faced no meaningful challenges from anti-regulatory groups or states, while the vaccination standard was struck down based on lawsuits filed by states and business groups, as described in Section II.A.

2. Enforcement

OSHA issued its first violation to an employer on July 13, 2020—more than four months after the pandemic began. The first violations were issued to three skilled nursing facilities in Ohio after seven employees were hospitalized with COVID-19. The agency cited the company for failure to develop a written

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161 Two labor unions petitioned for review on the grounds that it was underinclusive and arbitrarily excluded other workers. But those challenges were stayed or withdrawn as OSHA proceeded on its second standard targeting vaccines. UFCW v. OSHA, No. 21-1143 (D.C. Cir. filed June 24, 2021) (held in abeyance); Nat’l Nurses United v. OSHA, No. 21-71142 (9th Cir. voluntarily dismissed July 7, 2021). The health care industry did not mount a legal challenge, despite asking for a six-month period in which to implement the rule. Fatima Hussein, Hospital Group Asks OSHA for 6-Month Halt of COVID-19 Standard, BLOOMBERG L. (June 30, 2021), https://news.bloomberglaw.com/safety/hospital-group-asks-osha-for-6-month-halt-of-covid-19-standard.

respirator protection program and “failing to provide medical evaluations to determine employees’ ability to use a respirator in the workplace.”

The agency’s policies suggest that early on, OSHA was focused on responding to a deluge of complaints while protecting its inspectors from entering workplaces where they would be exposed to COVID-19, except in the most dire situations. The enforcement plan prioritized “fatalities and imminent danger exposures . . . with particular attention given to healthcare organizations and first responders.”

The guidance stated that on-site inspections would be warranted mainly in cases of alleged “unprotected exposures to COVID-19 for workers with high/very high risk of transmission,” such as exposure to COVID-19 patients in hospitals without adequate personal protective equipment. Most other cases, where workers were in lower-risk situations or performing lower-risk tasks, would be handled by phone or letter. In a non-formal, remote inspection, OSHA sends a letter to the employer reporting the complaint and asking for information documenting that the workplace is compliant or that the problem has been resolved. The agency’s Inspector General argued these were less effective than in-person inspections, which frequently result in immediate resolution of the hazard.

The guidance document stated that employers could be cited for violations of existing regulations covering recordkeeping, personal protective equipment (including respirator use), sanitation, and the GDC. Even though no standard directly responded to the hazard except for the GDC, the guidance curtailed inspectors’ ability to issue these citations, because any citation under the clause needed formal sign-off by the National Office prior to issuance. OSHA maintained that it would take account of employers’ “good faith efforts” at compliance with health and safety standards during the ongoing emergency.

After the initial nursing home citations, OSHA increased its enforcement, issuing 1,552 violations after COVID-19-related inspections of private businesses.

163 Id.
165 Id.
166 Id.
167 Id.
168 2021 DOL-OIG COVID-19 AUDIT, supra note 4, at 5.
169 Id. at 8-9.
170 OSHA APRIL 2020 INTERIM ENFORCEMENT PLAN, supra note 164.
171 Id.
from September through December 2020. As discussed in more detail below, most of those citations were issued in the health care sector after fatalities or catastrophes in the workplace rather than through proactive investigation. Advocates have argued businesses were not fined and violations were not publicized to amplify their deterrent effect.

D. State Plan Responses

The State Plans responded to COVID-19 in ways that were both more and less effective than OSHA. At the level of standards, no State Plan fell below OSHA’s bar during the first year of the pandemic since OSHA did not issue a standard. However, several State Plans adopted emergency standards that provided significantly more protection than existing federal regulations. As for enforcement, more than half of the State Plans operated at a level that produced less of a deterrent effect than OSHA. Despite this, OSHA did not press them into more stringent enforcement.

1. Standards

State Plans remained as effective as OSHA insofar as OSHA did not issue any COVID-19-related standards during the first year of the pandemic. Like OSHA, most State Plans responded to COVID-19 with a combination of guidance and existing standards. For example, South Carolina OSHA issued a guidance document in May 2020 that suggested mitigation measures based on a sector’s risk level and identified the OSHA regulations that could be cited. State Plans also conducted informational sessions with employers and consultations relating to safety measures.

However, some State Plans issued emergency standards that made them more effective than OSHA. California, Michigan, Oregon, and Virginia issued

173 FOIA Data.
174 See Section III.A, infra, for data and a discussion of OSHA’s focus on the health care sector.
temporary standards that set out specific requirements for employers to protect their workers from COVID-19. New Mexico issued a rule improving reporting of workplace illness, and Washington used a simple standard that empowered the State Plan to enforce the governor’s emergency orders relating to workplaces.\textsuperscript{178} In promulgating the standards, the state agencies took public feedback; but because the rules were issued on an emergency basis, they did not need to go through regular notice-and-comment procedures. These states were able to respond nimbly in drafting and implementing new rules. They also were able to coordinate with other state agencies for purposes of policymaking and enforcement.

Virginia was the first state to begin comprehensive emergency rulemaking. The decision to begin a rulemaking in Virginia was prompted by an April 2020 petition from workers’ groups, including an organization representing poultry workers, followed by an executive order from then-Democratic Governor Ralph Northam.\textsuperscript{179} Issuance of the Virginia standard was noteworthy not only because it came first, but also because Virginia is a “purple” state. Unlike California or Washington, it is not known for favoring additional, rule-based regulation. On June 12, 2020, the Virginia Department of Labor and Industry opened a ten-day comment period and announced an emergency meeting of the state Safety and Health Codes Board to adopt the standard. The state agency received more than 3,000 comments, with business and industry groups arguing against the rule and workers’ rights organizations arguing for it.\textsuperscript{180} The Board held four public hearings to review the proposed rule before adopting the standard on July 15, 2020, with a vote of nine in favor, two against, one abstaining, and two absent. The standard took effect on July 27, 2020.\textsuperscript{181}

The standard required all state employers to assess their workplaces for hazards and job tasks that could result in an exposure.\textsuperscript{182} Employers were required to notify workers within twenty-four hours of a known COVID exposure and

\begin{footnotes}
\textsuperscript{178} See discussion, \textit{infra}, for specifics of standards.
\textsuperscript{181} \textit{FINAL SAFETY AND HEALTH CODES BOARD PUBLIC HEARING AND MEETING MINUTES 19 (July 15, 2020)}, \url{https://townhall.virginia.gov/L/GetFile.cfm?File=meeting9231089%Minutes_DOLI_31089_v2.pdf} [https://perma.cc/94CF-3PBM].
\textsuperscript{182} Infectious Disease Prevention: SARS-CoV-2 Virus that Causes COVID-19 (Emergency Temporary Standard), 16 VA. ADMIN. CODE § 25-220 (July 15, 2020).
\end{footnotes}
report clusters of more than three cases to the local health department.\textsuperscript{183} Higher-risk employers were also required to create written COVID-19 response plans and assess their ventilation, among other requirements.\textsuperscript{184}

California, Oregon and Michigan took similar approaches. California already had a relevant standard on the books when the pandemic began.\textsuperscript{185} The state supplemented the existing aerosol transmissible disease standard that applied mainly to health care workers with a new standard specific to COVID-19.\textsuperscript{186} The California standard, as well as the standards issued in Oregon and Michigan, required employers to evaluate their workplaces for hazards and develop a COVID-19 protection plan. These rules further required physical distancing, masking, and cleaning.\textsuperscript{187} The California standard mandated pay for workers excluded from the workplace due to exposure and regular testing in case of a work-related outbreak.\textsuperscript{188} Oregon’s standard, issued after an informal public comment period,\textsuperscript{189} had heightened requirements for health care settings.\textsuperscript{190} The Michigan standard had the feature of prohibiting in-person work “to the extent that their work can feasibly be completed remotely.”\textsuperscript{191} Where it could not, employers were required to conduct daily screenings and notify the health department of cases.\textsuperscript{192}

Washington took a different approach. In May 2020, the state OSHA adopted a rule incorporating the governor’s emergency proclamations, giving the agency authority to enforce the health and safety orders as they evolved.\textsuperscript{193} Specifically, the rule provides that “[w]here a business activity is prohibited by an emergency proclamation an employer shall not allow employees to perform work.”\textsuperscript{194} Lastly, New Mexico issued an emergency amendment to its recordkeeping rule, requiring

\textsuperscript{183} Id.
\textsuperscript{184} Id.
\textsuperscript{185} AEROSOL TRANSMISSIBLE DISEASES, CAL. CODE REGS. tit. 8, § 5199.
\textsuperscript{186} COVID-19 Prevention, CAL. CODE REGS. tit. 8, § 3205 (effective Nov. 30, 2020 to June 17, 2021).
\textsuperscript{187} Id. § 3205(c); OR. ADMIN. R. 437-001-0744, § 3(h) (2020); MI. OCCUPATIONAL SAFETY & HEALTH ADMIN., EMERGENCY RULES CORONAVIRUS DISEASE 2019, Rule 3 (Oct. 14, 2020).
\textsuperscript{188} COVID-19 Prevention, CAL. CODE REGS. tit. 8, § 3205(c)(10)(C) (effective Nov. 30, 2020 to June 17, 2021).
\textsuperscript{190} OR. ADMIN. R. 437-001-0744(4) (2020).
\textsuperscript{192} Id.
\textsuperscript{193} WASH. ADMIN. CODE § 296-800-14035.
\textsuperscript{194} Id.
employers to report employee COVID-19 cases to the state OSHA agency within four hours of discovering the case.\textsuperscript{195} None of these emergency standards faced a successful legal challenge.\textsuperscript{196}

2. \textit{Enforcement}

During the first year of the pandemic, OSHA enforcement related to COVID-19 varied dramatically among the states, leaving workers with disparate levels of protection as the virus surged. While certain State Plans conducted more effective enforcement than OSHA, others lagged behind the federal agency’s response. To measure effectiveness, this Article looks at the deterrent effect of enforcement activity in each state, using data derived from FOIA requests to OSHA.\textsuperscript{197}

OSHA enforcement can rectify existing workplace hazards and deter future ones at the cited employer and in the greater business community. Economists describe this as specific deterrence and general deterrence.\textsuperscript{198} Specific deterrence occurs where employers fix workplace hazards after being issued an OSHA penalty.\textsuperscript{199} A study finding that workplace injuries decline in the years after an OSHA penalty is imposed supports the rational deterrence model of employer decisions relating to compliance with OSHA standards.\textsuperscript{200} That is, “employers will comply when noncompliance is more costly than compliance. Generally, the risk-neutral cost of compliance is calculated as the probability of being caught multiplied by the penalty if caught.”\textsuperscript{201} While the study looked at injuries, not illnesses,\textsuperscript{202} the short onset of COVID-19 makes it more like an injury than many long-onset illnesses concerning OSHA, suggesting the logic would apply in this case. General deterrence is the effect that penalties have on other employers, who fear being cited themselves.\textsuperscript{203} The general deterrent effect is more difficult to study, because many factors may influence a company’s decision to mitigate

\textsuperscript{195} N.M. CODE R. § 16.11.5.1 (2020).
\textsuperscript{197} See Section II.B, supra, for a review of the methodology in this Article.
\textsuperscript{198} HUBER, supra note 26, at 86-88 (reviewing literature on the deterrent effect of OSHA enforcement).
\textsuperscript{199} Id. at 87.
\textsuperscript{200} Id.
\textsuperscript{201} Id. (internal citations omitted).
\textsuperscript{202} Id.
\textsuperscript{203} Id. at 88.
workplace hazards. Nonetheless, “[g]eneral deterrence plays some, as yet undetermined, role in encouraging employers to reduce workplace hazards.” A recent study found that well-publicized penalties lead to significantly fewer violations at peer facilities within the same region. These studies suggest that OSHA enforcement has a deterrent effect on future violations at the same firm and at surrounding firms, at least if the violations are well-publicized.

This Article aims to provide a rough measure for the deterrent effect of an OSHA agency related to COVID-19 and to use deterrence as a proxy for effectiveness in the context of enforcement. This approach enables a comparison between state and federal responses without bringing in the confounding factors that mediate between workplace safety enforcement and COVID-19 cases and deaths. It will be valuable to make these outcome-based comparisons, and it is the author’s hope that others will study the potential correlations in the future.

“The core assumption of [a deterrence metric] is that deterrence is a function of the probability that noncompliance is detected and the degree of punishment conditional on detection.” The deterrent effect here is approximated as the product of (a) the likelihood of detection and (b) the cost of detection. The number of inspections conducted per establishment serves as a proxy for the likelihood of detection because it reflects the frequency of citations in a standardized way. The average penalty faced by an employer issued a violation serves as a proxy for the cost of detection.

From a bird’s-eye view, State Plans conducted much more enforcement during the study period—February 1, 2020 through March 17, 2021—than OSHA did. But this high-level perspective obscures the on-the-ground reality. A few states accounted for most State Plan enforcement. State Plans are responsible for protecting workers in 41 percent of American establishments. As demonstrated in Table 1, State Plans issued 5.33 times as many citations to private businesses after

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204 Id.
205 Id.
207 HUBER, supra note 26, at 185. Political scientist Gregory Huber has compared OSHA and the State Plans through their relative deterrent effects. This analysis is roughly modeled on the analysis conducted by Professor Huber, id. at 184-96. Professor Huber’s deterrence metric brings together “information about the size of the regulated community, agency resources, and the use of these resources into a single statistic summarizing how aggressively an agency enforces the law.” Id. at 185. Professor Huber’s metric is the product of (1) the number of inspectors in each agency relative to the size of the regulated community and (2) a standardized number of serious violations issued after an inspection.

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inspections related to COVID-19 than OSHA did. This is consistent with prior statistics demonstrating State Plans issue more violations, but the ratio was far higher during the pandemic. As demonstrated in Table 2, in 2008, State Plans issued 1.39 times as many violations as OSHA. During the study period, while State Plans were more likely to issue violations, they were also more likely to issue smaller penalties. The average initial penalties per employer cited by State Plans were 79 percent of the value of penalties imposed by OSHA. This is higher than data from 2008, which indicate average penalties for serious violations were 49 percent of those imposed by OSHA.

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208 FOIA Data. The data exclude violations issued to public sector employers, as well as OSHA enforcement in states with comprehensive State Plans. Public sector workers are excluded because OSHA lacks jurisdiction over state and local employers; State Plans are required to cover them. OSHA enforcement in State Plans is limited to federal enclaves and employers and specific, carveout industries.


210 Id.

211 FOIA Data.

212 Nevada OSHA Hearing, supra note 71, at 62-65.
Table 1: Summary of OSHA Enforcement in COVID-19-Related Inspections for Private Sector Businesses from February 1, 2020 through March 17, 2021

<table>
<thead>
<tr>
<th></th>
<th>Federal</th>
<th>State Plans</th>
<th>Ratio of State to Federal</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of U.S. Business Establishments</td>
<td>4,717,409</td>
<td>3,294,548</td>
<td></td>
</tr>
<tr>
<td>Share of U.S Business Establishments</td>
<td>59%</td>
<td>41%</td>
<td></td>
</tr>
<tr>
<td>Complaints/Referrals</td>
<td>16,192</td>
<td>55,591</td>
<td>3.43</td>
</tr>
<tr>
<td>Inspections Conducted</td>
<td>1,703</td>
<td>5,890</td>
<td>3.45</td>
</tr>
<tr>
<td>Employers Cited</td>
<td>532</td>
<td>1,988</td>
<td>3.74</td>
</tr>
<tr>
<td>Citations Issued&lt;sup&gt;213&lt;/sup&gt;</td>
<td>1,576</td>
<td>6,118</td>
<td>3.88</td>
</tr>
<tr>
<td>Inspections Conducted per 10,000 Establishments</td>
<td>3.61</td>
<td>17.87</td>
<td>4.95</td>
</tr>
<tr>
<td>Employers Cited per 10,000 Establishments</td>
<td>1.13</td>
<td>6.03</td>
<td>5.33</td>
</tr>
<tr>
<td>Total Initial Penalties Imposed&lt;sup&gt;214&lt;/sup&gt;</td>
<td>$6.33 million</td>
<td>$18.61 million</td>
<td>2.94</td>
</tr>
<tr>
<td>Average Penalty per Employer</td>
<td>$11,902.00</td>
<td>$9,362.91</td>
<td>0.79</td>
</tr>
<tr>
<td>Deterrent Effect</td>
<td>4.30</td>
<td>16.74</td>
<td>3.89</td>
</tr>
</tbody>
</table>

Source: FOIA requests from OSHA, OSHA COVID-19 Response Summary, U.S. Census Data

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<sup>213</sup> While all inspections related to COVID-19, some violations issued in response to other hazards present at the worksite.

<sup>214</sup> Penalties are often reduced substantially on settlement or after a successful contest. See Martha T. McCluskey et al., OSHA’s Discount on Danger: OSHA Should Revise Its Informal Settlement Policies to Maximize the Deterrent Value of Citations, CTR. FOR PROGRESSIVE REFORM 5-7, 8-13 (June 2016), https://cpr-assets.s3.amazonaws.com/documents/OSHA_Discount_on_Danger_Report.pdf [https://perma.cc/3KKT-B98B]. Given that many of the cases had not fully resolved when the FOIA request was produced, initial penalties represent the best comparative figure. Initial penalties also serve a deterrent effect in that they are often publicized where final settlements may not be.
Table 2: Comparative OSHA Enforcement in Fiscal Year 2008

<table>
<thead>
<tr>
<th></th>
<th>Federal</th>
<th>State Plans</th>
<th>Ratio of State to Federal</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Citations Issued</strong></td>
<td>87,687</td>
<td>122,288</td>
<td>1.39</td>
</tr>
<tr>
<td><strong>Penalties Imposed</strong></td>
<td>$103,350,367</td>
<td>$70,248,913</td>
<td>0.68</td>
</tr>
<tr>
<td><strong>Average Penalty/Citation</strong></td>
<td>$1,179</td>
<td>$574</td>
<td>0.49</td>
</tr>
</tbody>
</table>

Source: 2009 Congressional hearing on OSHA State Plans

Most of this enforcement occurred, however, in a handful of states. Of the 1,988 businesses employers cited in State Plans, 1,719 were in just five states—California, Michigan, Nevada, Oregon, and Washington.216 Among those states, employers were cited at a rate of 10.94 per 10,000.217 Among the rest of the State Plans, the rate was 1.56 per 10,000.218 Together, four of those states—California, Michigan, Nevada, and Washington—accounted for 89 percent of all fines imposed, although those states account for just 45 percent of all business establishments under State Plan jurisdiction.219

There was also significantly more variation in enforcement outputs among State Plans than among states under OSHA jurisdiction, as demonstrated by Table 3. The standard deviation of employers cited per 10,000 establishments in State Plans is 7.5, while it is 1.03 among OSHA states.220 This indicates that State Plans were farther apart with respect to their enforcement levels than OSHA states were. In essence, the disparate enforcement that preceded the OSH Act persisted during the COVID-19 pandemic.

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216 FOIA Data. See Table 3, infra, for a state-by-state comparison.
217 FOIA Data.
218 Id.
219 Id.
220 Id. Considerable variation also existed among OSHA states, many of which saw little to no enforcement. In sixteen states, OSHA issued violations to fewer than ten employers. This finding raises questions about OSHA’s supervision of its regional offices. But given that OSHA operates a singular program, its response may be evaluated as one agency. This is an area for future scholarly research but outside the scope of this Article.
### Table 3: State-By-State Private Sector Enforcement Relating to COVID-19 in State Plans from February 1, 2020 through March 17, 2021

<table>
<thead>
<tr>
<th>State Plan</th>
<th>Deterrence</th>
<th>Inspections per 10,000 Establishments</th>
<th>Employers Cited per 10,000 Establishments</th>
<th>Average Initial Penalty per Employer</th>
</tr>
</thead>
<tbody>
<tr>
<td>Washington</td>
<td>87.92</td>
<td>41.11</td>
<td>15.63</td>
<td>$21,387</td>
</tr>
<tr>
<td>Nevada</td>
<td>40.92</td>
<td>59.94</td>
<td>28.00</td>
<td>$6,827</td>
</tr>
<tr>
<td>Michigan</td>
<td>24.22</td>
<td>60.88</td>
<td>22.32</td>
<td>$3,978</td>
</tr>
<tr>
<td>California</td>
<td>23.72</td>
<td>19.56</td>
<td>5.84</td>
<td>$12,128</td>
</tr>
<tr>
<td>Alaska</td>
<td>19.16</td>
<td>5.14</td>
<td>2.34</td>
<td>$37,283</td>
</tr>
<tr>
<td>Virginia</td>
<td>8.13</td>
<td>7.47</td>
<td>2.41</td>
<td>$10,885</td>
</tr>
<tr>
<td>Minnesota</td>
<td>6.98</td>
<td>12.87</td>
<td>4.29</td>
<td>$5,423</td>
</tr>
<tr>
<td>New Mexico</td>
<td>6.35</td>
<td>6.16</td>
<td>3.88</td>
<td>$10,294</td>
</tr>
<tr>
<td>Utah</td>
<td>5.33</td>
<td>19.54</td>
<td>4.53</td>
<td>$2,729</td>
</tr>
<tr>
<td>Vermont</td>
<td>4.50</td>
<td>4.32</td>
<td>2.40</td>
<td>$10,404</td>
</tr>
<tr>
<td>OSHA</td>
<td>4.30</td>
<td>3.61</td>
<td>1.13</td>
<td>$11,902.00</td>
</tr>
<tr>
<td>Kentucky</td>
<td>4.26</td>
<td>6.58</td>
<td>0.99</td>
<td>$6,475</td>
</tr>
<tr>
<td>Indiana</td>
<td>4.21</td>
<td>5.71</td>
<td>0.54</td>
<td>$7,372</td>
</tr>
<tr>
<td>Iowa</td>
<td>3.93</td>
<td>3.50</td>
<td>1.33</td>
<td>$11,218</td>
</tr>
<tr>
<td>Oregon</td>
<td>3.33</td>
<td>39.98</td>
<td>13.60</td>
<td>$832</td>
</tr>
<tr>
<td>Hawaii</td>
<td>2.37</td>
<td>0.91</td>
<td>0.30</td>
<td>$26,024</td>
</tr>
<tr>
<td>South Carolina</td>
<td>1.98</td>
<td>2.23</td>
<td>0.63</td>
<td>$8,850</td>
</tr>
<tr>
<td>Puerto Rico</td>
<td>1.98</td>
<td>11.62</td>
<td>1.34</td>
<td>$1,700</td>
</tr>
<tr>
<td>North Carolina</td>
<td>1.36</td>
<td>2.31</td>
<td>0.21</td>
<td>$5,900</td>
</tr>
<tr>
<td>Tennessee</td>
<td>0.53</td>
<td>2.50</td>
<td>1.43</td>
<td>$2,104</td>
</tr>
<tr>
<td>Arizona</td>
<td>0.31</td>
<td>2.65</td>
<td>1.09</td>
<td>$1,152</td>
</tr>
<tr>
<td>Maryland</td>
<td>0</td>
<td>1.08</td>
<td>0.50</td>
<td>$0</td>
</tr>
<tr>
<td>Wyoming</td>
<td>0</td>
<td>0.93</td>
<td>0</td>
<td>$0</td>
</tr>
</tbody>
</table>

Source: FOIA Requests from OSHA, U.S. Census Data

The deterrent effect of State Plans also varied greatly, as shown in Table 3. Ten of the twenty-two State Plans ran enforcement programs with a greater...
deterrent effect than OSHA, while twelve states had less of a deterrent effect.\textsuperscript{221} Washington operated the State Plan with by far the greatest deterrent effect. The response was achieved through the unique use of state resources.\textsuperscript{222} In May 2020, Governor Jay Inslee was looking for ways to enforce his emergency proclamations requiring business closures and mitigation measures—without relying on criminal sanctions.\textsuperscript{223} Recognizing the Washington State Plans’ (WISHA) authority to issue civil penalties to all businesses in the state, the governor asked the agency to promulgate a rule enabling the agency to enforce his executive orders. WISHA, which employs around 150 workplace safety inspectors, quickly deputized an additional 450 to 550 inspectors from elsewhere in the Department of Labor & Industries, of which it is a component part.\textsuperscript{224} Where those compliance officers might have normally conducted elevator safety or carnival ride inspections, they were now on duty for COVID-19.\textsuperscript{225} The agency set up a unit to filter the thousands of complaints to the governor’s office.\textsuperscript{226} Then the agency inspectors sent letters and conducted inspections to determine whether businesses were properly closed or complying with safety measures.\textsuperscript{227} The proactive response was also informed by Washington’s early tracking of workplace COVID-19 outbreaks.\textsuperscript{228} In sum, the agency sought through enforcement to protect both worker health and public health through its state OSHA program.

Contrasted with Washington, it is noteworthy how far behind certain states lagged from OSHA. Arizona, North Carolina, Maryland, Tennessee, and Wyoming stand out for their particularly ineffective programs. In Wyoming, \textit{not a single OSHA citation} was issued relating to a COVID-19 inspection during the study period.\textsuperscript{229} In Maryland, officials issued $0 in fines during the same period in COVID-19-related inspections.\textsuperscript{230} It is not conceivable that there simply were no hazards to be remediated in states without regulations or substantial numbers of violations. Rather, those State Plans likely disregarded COVID-19 risks or refused to inspect and penalize employers. Workers there were left without a robust OSHA program to protect them from exposure to COVID-19.

In comparing State Plans and OSHA, it is important to recognize the context in which such decisions were made and the factors associated with stronger and...
weaker enforcement programs. As a general matter, unique standards and vigorous enforcement are more feasible in certain states than they were in other states and the federal government. State Plans can be more nimble than OSHA, because their rules are not subject to the Administrative Procedure Act or, in general, review in federal court, such as the U.S. Supreme Court’s fateful review of the vaccine-or-test standard.\textsuperscript{231} They may also have broader authority than OSHA to implement programs that reach public health, as well as worker safety.

Politics matter too. It can be politically difficult for OSHA to promulgate new standards or enforce them vigorously—and depending on the administration, it may be infeasible. OSHA is a component of an executive agency, the Department of Labor, which is headed by a political appointee. Politics is intrinsic to the agency, and policies are shaped by the political party in charge. Meanwhile, the agency has few built-in proponents and an army of critics—including Congress, which has from the 1970s made numerous efforts to repeal the OSH Act or reduce the agency’s authority.\textsuperscript{232} During most of the first year of the COVID-19 pandemic, the Department of Labor was headed by Trump appointee Eugene Scalia, son of the conservative Supreme Court Justice Antonin Scalia and, prior to his public service, a frequent representative of business and industry in labor and employment-related disputes.\textsuperscript{233} By contrast, all six states that did COVID-19 rulemaking had a Democratic governor. Those governors likely helped propel the rulemaking, even where Republicans had leverage in the state assembly or regulatory boards. Greater state enforcement generally correlated with Democratic executive political control over the state OSHA agency.\textsuperscript{234} This dynamic is particularly visible in North Carolina, which has a Democratic governor but a Republican-elected labor commissioner.

This context does not fully justify OSHA’s or the less regulatory states’ weak approach to enforcement, however. First, two states that pursued regulation—Michigan and Virginia—are famously “purple”; even though they had Democratic leadership during the first year of the pandemic, regulation succeeded despite political hurdles. Second, the statute that allows OSHA to draft an ETS eliminates the requirement to go through the lengthy notice-and-comment process that mires ordinary OSHA standards. The Washington example further suggests that OSHA could have found ways to expand its inspectorate through cooperation with other state and federal agencies. Given the scope and novelty of the emergency, issuing a standard or conducting vigorous inspections was probably not outside the scope of political possibility for the federal government or most states.

\textsuperscript{231} NFIB v. OSHA, 142 S. Ct. 661, 665-66 (2022) (per curiam).
\textsuperscript{232} HUBER, supra note 26, at 73.
\textsuperscript{233} Lerner, supra note 150.
\textsuperscript{234} See Table 3, supra.
3. Monitoring

The enforcement disparity was tacitly permitted by OSHA, which conducted little monitoring of State Plan enforcement responses to COVID-19, leaving states to pursue whatever approach they wished. North Carolina State Plan (OSHNC) conducted one of the weakest enforcement responses. The state’s workplace fatalities rose from fifty-four in FY 2019 to seventy-eight in FY 2020, driven in large part by sixteen recorded work-related COVID-19 deaths. But the state OSHA agency issued violations to 0.21 out of every 10,000 businesses in the state during the study period, less than a quarter of OSHA’s rate. In FY 2020, OSHNC conducted just twenty-one inspections related to COVID-19 after receiving 1,050 complaints and referrals. Instead, OSHNC provided technical assistance and webinars, participated in working groups, created FAQs, and posted billboards advertising the agency’s services. In its annual evaluation, OSHA provided no feedback on OSHNC’s COVID-19 efforts except to list them under “Special Accomplishments.” OSHA concluded that OSHNC “continued to meet all criteria for an effective State Plan.” This was because OSHNC “generally met or exceeded federal activity results.” Of course, those measures were less meaningful in a year when work shifted dramatically and high-hazard jobs were put on hold for months, facts the report fails to acknowledge.

Even where credible complaints were made about State Plan responses, OSHA did not intervene to correct the State Plan response. During the first year of the pandemic, advocacy groups filed Complaints About State Plan Administration (CASPAs) relating to the performance of the State Plans in Iowa and Maryland, two states identified in Table 3 as among the least effective. The ACLU of Iowa filed a CASPA noting that the state agency conducted inspections following just 5 of 148 complaints, apparently in violation of its own policies. It appeared that Iowa OSHA inspections would generally commence only after

235 See Table 1, supra.
236 NORTH CAROLINA FY 2020 FAME REPORT, supra note 177.
237 FOIA Data. See Table 3, supra.
238 NORTH CAROLINA FY 2020 FAME REPORT, supra note 177, at 3.
239 Id. at E-12 to E-14.
240 Id.
241 Id. at 3.
242 Id.
245 Iowa CASPA, supra note 243, at 5.
media coverage and political pressure over outbreaks.\textsuperscript{246} “This pattern creates a perception among Iowa workers that Iowa OSHA is only motivated to investigate dangerous working conditions after significant public pressure,” the ACLU wrote.\textsuperscript{247} Nonetheless, OSHA concluded that the State Plan “followed protocols and no deficiencies [were] noted.”\textsuperscript{248}

In Maryland, the Public Justice Center (PJC) complained to OSHA that the State Plan did not investigate COVID-19-related complaints but simply forwarded them to local health departments.\textsuperscript{249} The advocacy group criticized the Maryland agency’s failure to conduct in-person inspections or use the General Duty Clause to enforce COVID-19 protections. The CASPA specifically discussed an incident where Maryland’s State Plan failed to sufficiently investigate a complaint that employees lacked proper respirators to protect them from wood and paint dust exposure that made them “more susceptible to complications from COVID-19.”\textsuperscript{250} Despite the spread of COVID-19 through that workplace, the Maryland agency initially refused to investigate beyond sending the employer a letter asking them to self-investigate, claiming the most they could enforce was “failure to provide hand sanitizer.”\textsuperscript{251} After follow-up complaints were filed, the agency allegedly conducted an on-site investigation but refused to interview workers through their representative, PJC, opting instead to go through the employer, who workers feared would retaliate against them for speaking out. OSHA’s investigation of the CASPA resulted in no findings or recommendations.\textsuperscript{252}

OSHA’s statutory responsibility amounts at least to ensuring that State Plans conduct enforcement that is at least as effective as the federal agency’s enforcement. As the above demonstrates, certain states greatly exceeded OSHA’s efforts. But OSHA could take little credit for it. Rather, the federal agency’s lack of monitoring of enforcement practices allowed certain State Plans to be less effective than OSHA.\textsuperscript{253}

\textsuperscript{246} Id.
\textsuperscript{247} Id.
\textsuperscript{250} Letter from David Rodwin, supra note 244, at 2.
\textsuperscript{251} Id.
\textsuperscript{252} Maryland FY 2020 FAME Report, supra note 96, at 5.
\textsuperscript{253} See Section I.C, supra, for a discussion of the Biden Administration OSHA’s threatened revocation of Arizona’s final approval to operate a State Plan, in part due to the agency’s failure to adopt an emergency COVID-19 standard for health care workers.

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A significant distinguishing factor between OSHA and certain State Plans was the existence of a specific standard regulating the risk of COVID-19 or other airborne transmissible diseases. This Part argues OSHA could have enhanced nationwide enforcement during the COVID-19 pandemic by issuing an emergency temporary standard. Standards are better tools to facilitate enforcement than guidance documents or the General Duty Clause (GDC), because they provide clearer instructions for employers and inspectors to follow. This was borne out by the experience of State Plans that deployed temporary standards during the pandemic. Structurally, standards also offer an efficient way for OSHA to monitor State Plan behavior. Far simpler and more sweeping than examination of state-level enforcement outputs, standards provide OSHA a tool to level up State Plan behavior and employer compliance.

A. Enabling Enforcement

Enforceable standards enable OSHA and the State Plans to conduct effective enforcement in a way that guidance and the GDC do not. Most obviously, they provide inspectors concrete issues to look for during an investigation and establish the existence of a hazard when certain conditions are in place. Beyond this, standards set industry norms, which is especially important when the agency is short on resources.

During the COVID-19 pandemic, employers were confronted with myriad guidance documents, FAQs, and state executive orders that frequently changed, causing uncertainty about their duties under the law and possible liability. A clear standard would have clarified employer obligations and likely improved workplace conditions, even absent aggressive enforcement. Indeed, OSHA has recognized that “[c]onveying obligations as clearly and specifically as possible makes it much more likely that employers will comply with those obligations and thereby protect workers from COVID-19 hazards.”

Binding standards relating to COVID-19 would have also been easier and more effective for the agency to enforce, as a comparison between enforcement by OSHA and the State Plans with COVID-19 rules demonstrates. OSHA issued about three-quarters of all violations to health care employers, including nursing homes, hospitals, and ambulance services—usually in response to a reported fatality. In these health care settings, OSHA could enforce its respirator

256 OSHA data indicate that during the study period (February 1, 2020 to March 17, 2021), the
protection standard, a detailed regulation that requires employers to maintain a written program, conduct regular fit tests, and train employees on how to wear the masks. As demonstrated in Table 4, respirator protection was the most cited OSHA violation by a wide margin, comprising 976 of 1,585 citations issued by the federal agency during the time period studied.\textsuperscript{257} The second most cited violation was failure to keep appropriate records or make timely reports to OSHA.\textsuperscript{258} While appropriate respirator protection was undoubtedly an important measure to protect health care workers, it was not a widely applicable measure, as it did not apply for normal face coverings. And for much of the first year, respirators were neither available nor appropriate for most workers. Thus, enforcement of the existing standard did not serve to protect workers across industries.

Table 4: Federal Citations by Standard in COVID-19-Related Inspections for Private Sector Businesses from February 1, 2020 through March 17, 2021\textsuperscript{259}

<table>
<thead>
<tr>
<th>Standard</th>
<th>Citations Issued</th>
</tr>
</thead>
<tbody>
<tr>
<td>All</td>
<td>1,585</td>
</tr>
<tr>
<td>Respirator Violations</td>
<td>976</td>
</tr>
<tr>
<td>Recordkeeping/Reporting</td>
<td>233</td>
</tr>
<tr>
<td>Hazard Alert Letter (No Standard)</td>
<td>93</td>
</tr>
<tr>
<td>General Duty Clause</td>
<td>85</td>
</tr>
<tr>
<td>Personal Protective Equipment</td>
<td>32</td>
</tr>
<tr>
<td>Other</td>
<td>166</td>
</tr>
</tbody>
</table>

Source: FOIA Request from OSHA

\textsuperscript{257} Table 4, infra.
\textsuperscript{258} Id.
\textsuperscript{259} These figures derive from the FOIA request from OSHA and include federal enforcement in states primarily covered by State Plans where OSHA maintains jurisdiction over some federal enclaves or agencies. See e.g., OCCUPATIONAL SAFETY & HEALTH ADMIN., CALIFORNIA STATE PLAN, https://www.osha.gov/stateplans/ca [https://perma.cc/27VM-WZEY] (noting that OSHA continues to cover maritime and aircraft employment, private employers within military enclaves, national recreation areas and tribal reservations, and contractors engaged with the U.S. Postal Service) (last viewed Mar. 3, 2023).
The data further suggest that the GDC was no substitute for an enforceable standard, despite OSHA’s early claims.\textsuperscript{260} During the study period, the GDC was cited just eighty-five times. This is hardly surprising, as enforcing the GDC requires a high degree of agency resources,\textsuperscript{261} and the agency has long struggled to quickly issue and defend citations.\textsuperscript{262} Thus, the agency historically—and during the pandemic—used it sparingly.\textsuperscript{263} Indeed, OSHA later acknowledged that the GDC was “grossly inadequate to protect employees . . . from the grave danger posed by COVID-19 in the workplace.”\textsuperscript{264} One problem with the standard is that it requires a relatively large amount of proof for the agency to cite. The agency must show in each case that the workplace conditions—such as unmasked workers standing near each other for hours—pose a “COVID-related hazard.”\textsuperscript{265} By contrast, an OSHA standard itself establishes that a hazard exists.\textsuperscript{266}

An ETS could have mandated the kind of controls suggested in guidance from OSHA or the Centers for Disease Control and Prevention. At its simplest, the rule could have required masks in workplaces—potentially intervening before the issue became highly politicized. A standard could also have implemented many of the other physical interventions, such as ventilation, required by certain State Plans. OSHA could have also used rulemaking, as certain State Plans did, to gather information about ongoing outbreaks, allowing the agency to intervene before a fatality. The rule could have been issued in conjunction with a National Emphasis Program on the emergency. These programs require OSHA and the State Plans to conduct surprise inspections in industries related to hazards of particular concern.\textsuperscript{267} Instituting such a program early would have signaled to the State Plans

\begin{itemize}
  \item \textsuperscript{260}Sweatt Testimony, supra note 127.
  \item \textsuperscript{261}Michaels & Wagner, supra note 59 (“General duty clause citations require a tremendous amount of work by the OSHA technical staff and attorneys and do often take several months to issue.”).
  \item \textsuperscript{262}See Marc Linder, I Gave My Employer a Chicken that Had No Bone: Joint Firm-State Responsibility for Line-Speed-Related Occupational Injuries, 46 CASE W. L. REV. 33 (1995) (describing the agency’s struggles defending citations issued under the General Duty Clause for working conditions that resulted in musculoskeletal disorders).
  \item \textsuperscript{263}House Meatpacking Report, supra note 2, at 11 (noting that OSHA personnel acknowledge to the Subcommittee that “violations under the General Duty Clause ‘can be more difficult to show, than the elements of proof required for violation of a hazard-specific standard’ had an ETS been issued”); 2021 DOL-OIG COVID-19 Audit, supra note 4, at 12 (arguing that OSHA should have adopted an emergency standard because “under the OSH Act’s General Duty Clause, violations are rarely issued”).
  \item \textsuperscript{264}OSHA Vaccine ETS, 86 Fed. Reg. 61,443 (noting that “despite publishing a voluminous collection of COVID–19 guidance online and receiving and investigating thousands of complaints, OSHA did not believe it could justify the issuance of more than 20 COVID–19 related General Duty Clause citations over the entire span of the pandemic so far, because of the quantum of proof the Secretary must amass under the General Duty Clause”).
  \item \textsuperscript{265}Id.
  \item \textsuperscript{266}Id.
  \item \textsuperscript{267}Occupational Safety & Health Admin., Revised National Emphasis Program—
that they should focus on the emergent hazard, even if it requires postponing or reducing enforcement of other hazards.

Early data indicate that an ETS addressing workplace controls could have enhanced OSHA’s response to COVID-19 and enabled the agency to enforce more effectively. As demonstrated by Table 5, states with comprehensive ETSs used them—and they likely used them as a replacement for citations under the GDC. \(^\text{268}\) In Michigan, for example, the percentage of citations under the GDC dropped from 8 percent to 0.3 percent after the ETS was issued; in Oregon, it dropped from 14 percent to 4 percent of citations issued. \(^\text{269}\) The high percentage of citations issued under the State Plan ETSs suggest that they were immediately applicable for state-level inspectors. Indeed, citations under the temporary standard quickly accounted for 21 percent to 48 percent of all citations issued in all five states that issued a comprehensive ETS. \(^\text{270}\) It is harder to say whether they increased enforcement overall, since enforcement patterns were very uneven during the first months of the pandemic and were particularly low in the first months. Washington saw a slightly different effect after the standard was issued—an increase in the percentage of violations issued both under the ETS and the GDC. \(^\text{271}\) This may be explained by the overall increase in citations and the evolving nature of the pandemic, particularly given that Washington issued its ETS very early.

\(^\text{268}\) New Mexico is excluded from this discussion because its emergency standard covered only recordkeeping and was, therefore, not a substitute for the General Duty Clause.
\(^\text{269}\) FOIA Data. See Table 5, infra.
\(^\text{270}\) Table 5, infra.
\(^\text{271}\) Id.
Table 5: State Use of Emergency Temporary Standards in COVID-19-Related Inspections for Private Sector Businesses from February 1, 2020, through March 17, 2021

<table>
<thead>
<tr>
<th>Date ETS Became Effective</th>
<th>Violations of ETS as percent of all COVID-19-related violations after ETS became effective until March 17, 2021</th>
<th>Violations of the GDC as percent of all COVID-19-related violations before ETS became effective</th>
<th>Violations of the GDC as percent of all COVID-19-related violations after ETS became effective</th>
</tr>
</thead>
<tbody>
<tr>
<td>California(^{272})</td>
<td>21% (19 of 90)</td>
<td>23% (370 of 1,511)</td>
<td>12% (11 of 90)</td>
</tr>
<tr>
<td>Michigan</td>
<td>29% (329 of 1,154)</td>
<td>8% (93 of 1,214)</td>
<td>0.3% (4 of 1,154)</td>
</tr>
<tr>
<td>Oregon</td>
<td>34% (24 of 71)</td>
<td>14% (38 of 277)</td>
<td>4% (3 of 71)</td>
</tr>
<tr>
<td>Virginia</td>
<td>48% (51 of 107)</td>
<td>5% (3 of 63)</td>
<td>1% (1 of 107)</td>
</tr>
<tr>
<td>Washington</td>
<td>30% (293 of 962)</td>
<td>2% (3 of 121)</td>
<td>11% (106 of 962)</td>
</tr>
</tbody>
</table>

Source: FOIA Request from OSHA

Unlike the federal respirator standard, the state-level emergency COVID-19 standards were suitable across industries, particularly in settings where a respirator mask would not have been accessible or available. Michigan provides an instructive example. The state OSHA agency applied its ETS to protect workers in restaurants, hotels, construction sites, schools, dental offices, hospitals, factories, and retail stores.\(^{273}\) The agency also publicized its enforcement through press releases.

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272 California does not have a state analogue of the General Duty Clause. Rather, Cal/OSHA has an Injury and Illness Protection Program (IIPP) standard that requires employers to evaluate their workplaces for hazards and, if a hazard exists, implement control measures. CAL. CODE REGS. tit. 8, § 3203. Cal/OSHA interpreted this statute to require employers not covered by its aerosol transmissible disease standard to evaluate their workplaces to determine if COVID-19 was a hazard and, if so, to implement infection control measures. DIV. OF OCCUPATIONAL SAFETY & HEALTH, CAL/OSHA INTERIM GENERAL GUIDELINES ON PROTECTING WORKERS FROM COVID-19 (May 14, 2020), https://www.dir.ca.gov/dosh/coronavirus/general-industry.html [https://perma.cc/PY2C-AJFP]. Because the state uses the IIPP standard in lieu of the General Duty Clause, it is substituted here.

releases posted on the website with links to the full citation documents,\textsuperscript{274} a level of transparency that is extremely rare among federal or state enforcement agencies and which may be valuable for promoting deterrence.\textsuperscript{275} For example, the agency cited a Christian school for failing to screen employees daily for symptoms, require face masks, place posters around the workplace, and maintain proper records.\textsuperscript{276} Likewise, a die casting operation was fined for failing to develop and implement a COVID-19 preparedness and response plan.\textsuperscript{277}

Attorneys for State Plans adopting emergency standards had similar impressions. Jay Withrow, Director of Legal Support for the Virginia State Plan, said that the standard improved employer compliance compared to the case-by-case adjudication under the GDC.\textsuperscript{278} He said that the standard also gave the agency flexibility to issue less serious violations than would be required under the GDC while achieving abatement.\textsuperscript{279} Elliott Furst, a senior attorney for Washington State Plan, also said the standard helped the state achieve compliance, including business closures.\textsuperscript{280} The vast majority of citations, he added, were not appealed.\textsuperscript{281}

The need to remain flexible amid a changing pandemic does not change the calculus of issuing an emergency standard. As Professor David Super has written, “contemporary legal thinking is in the thrall of a cult of flexibility.”\textsuperscript{282} So too, were the administrators at OSHA.\textsuperscript{283} Professor Super argues that legal decisions have four main inputs: information, applicable norms, decisional capacity, and


\textsuperscript{275} See Johnson, supra note 206, at 1868 (finding that “press releases revealing OSHA noncompliance lead to substantial improvements in workplace safety and health”).


\textsuperscript{278} Telephone Interview with Jay Withrow, supra note 179.

\textsuperscript{279} Id.

\textsuperscript{280} Telephone Interview with Elliott Furst, supra note 223.

\textsuperscript{281} Id.

\textsuperscript{282} David A. Super, Against Flexibility, 96 Cornell L. Rev. 1375, 1375 (2011).

\textsuperscript{283} Sweatt Testimony supra note 127; Sweatt Letter supra note 137.
implementation capacity.\textsuperscript{284} As he notes, only one of those—information costs—declines over time. Postponing decisions until all the information is available tends to underemphasize the cost of delay. During that time, the government’s “decisional capacity may become increasingly scarce.”\textsuperscript{285} “Decisions rarely become more valuable to society as a whole when rendered later, although particular parties may benefit substantially from delay.”\textsuperscript{286}

While COVID-19 was surprising in its scale, it was not an entirely novel hazard. As described in Part II, the agency has experience with health risks. In particular, the agency had responded to the H1N1 (Swine) Flu pandemic in 2009—an experience that caused OSHA to begin rulemaking to protect health care workers from infectious disease.\textsuperscript{287} The agency’s knowledge is further demonstrated by early guidance documents, which call for many of the same interventions discussed today, including ventilation, social distancing, and face masks.\textsuperscript{288}

The agency also had far more decisional capacity and clout to issue reasonable rules before the pandemic began—or in the first couple months—than it did once the flood of complaints began. Because OSHA has a built-in set of motivated critics, most rules it issues are subject to litigation. Prior to COVID-19, the agency issued nine emergency standards.\textsuperscript{289} The agency struggled to defend them, and of the six that were challenged, only one was upheld in full.\textsuperscript{290} Today, it is especially common for opponents of a regulation to seek relief in court, and business groups may be able to find a friendly ear in Texas, among other conservative courts.\textsuperscript{291} Yet a standard issued early in the pandemic would have been on stronger footing than the later vaccine-or-test standard that was justified by the grave danger to unvaccinated people.\textsuperscript{292} This was a difficult argument where most Americans were vaccinated, and those who were not had largely chosen not to get the vaccine.

Since an ETS must be replaced with a permanent standard within six months, OSHA would have also had an opportunity to rapidly develop a permanent standard. To be sure, the tight time frame would have been difficult for OSHA

\textsuperscript{284} Super, supra note 282, at 1401-02.
\textsuperscript{285} Id. at 1405, 1411-12.
\textsuperscript{286} Id. at 1412.
\textsuperscript{287} See Petition for Writ of Mandamus, supra note 140, at 9-10.
\textsuperscript{288} See GUIDANCE ON PREPARING WORKPLACES FOR COVID-19, supra note 144.
\textsuperscript{290} Id.
\textsuperscript{291} Emma Platoff, By Gutting Obamacare, Judge Reed O’Connor Handed Texas a Win. It Wasn’t the First Time., TEX. TRIB. (Dec. 19, 2018), https://www.texastribune.org/2018/12/19/reed-oconnor-federal-judge-texas-obamacare-forum-shopping-ken-paxton/ [https://perma.cc/S3JT-HNT8].
because standards usually take the agency several years to develop. However, this timeline would have enabled OSHA to expedite the review process, and the agency might have been able to leave the emergency rule in place longer than six months by demonstrating to a court that it was actively developing a permanent replacement.293

In developing its ETS, Oregon OSHA provided a thoughtful response to its critics, which applied equally to OSHA.

Oregon OSHA agrees that the rulemaking will need to proceed cautiously so as not to forestall future protective measures that may be superior to those developed by the rule. However, we believe that the science—at least as it relates to the primary protective measures that can be employed in the workplace—has reached a level of relative stability. And the stability and predictability that even a temporary rule provides is one of the strengths of moving toward rulemaking rather than continuing to rely upon workplace applications of evolving public health guidance. Finally, the rule can—if truly necessary—be revised if new developments truly merit such a revision.294

B. Guiding State Plans

Not only do specific rules enable enforcement in workplaces, they also empower OSHA to monitor enforcement by the State Plans. Standards are structurally suited to monitoring State Plans and ensuring their effectiveness. As described in Part I, State Plans must keep up with OSHA standards to remain “at least as effective.” Where OSHA implements an ETS, State Plans must adopt it or an equally effective alternative. Thus, federal standards could have established a baseline that employers in every State Plan must meet at risk of enforcement.

Standards are much easier for OSHA to monitor than enforcement outputs, particularly in an emergency. It is highly resource intensive for OSHA to analyze case files and enforcement statistics in individual states to determine whether they meet the standards set out by OSHA. Particularly in a moment when agency

293 See Department of Labor’s Opposition to the Petition for a Writ of Mandamus at 23, AFL-CIO v. Occupational Safety & Health Admin., U.S. Dep’t of Lab., No. 22-1002 (D.C. Cir. filed Jan. 21, 2022) (“[N]o court has considered whether an ETS remains in effect and enforceable when the Secretary is unable to finalize a permanent standard in a timeframe approaching the one contemplated by the OSH Act due to competing priorities.”).

resources are stretched to respond to a national workplace emergency such as COVID-19, this is a difficult task. Furthermore, determinations of enforcement effectiveness are contestable and, to some degree, subjective, as the debate over the meaning of “at least as effective” demonstrates.

By contrast, where OSHA requires State Plans to adopt a standard, its only monitoring obligation is to ensure that each agency adopts it or an alternative that is “at least as effective.” Where in an emergency OSHA may struggle to force State Plans to enhance their resources or vigor, the agency can require that State Plans adopt the standard or an equally effective alternative. To be sure, it requires work on OSHA’s part to ensure that State Plans adopt the emergency regulation. Because OSHA regulations are matters of state law within the State Plans, the states need to adopt them before they become effective. But failure to adopt a standard is an obvious violation of the State Plan’s duty to remain effective, providing a strong basis for the agency to threaten revocation of a State Plan or reconsideration of final approval.

And OSHA’s experience with the emergency COVID-19 standard promulgated for the health care industry in June 2021 suggests there would be widespread uptake—even if imperfect.295 Most State Plans quickly adopted the emergency standard—setting nationwide rules for how hospitals needed to protect their workers from infection with COVID-19—while Arizona, South Carolina, and Utah delayed adopting the standard.296 OSHA proceeded with further action only against Arizona, as described in Section I.C. To the extent some State Plans threatened to disregard the vaccine-or-test standard, it may reflect the specific discomfort around that rule.297 And it presents an opportunity for reform, discussed in Part IV.

IV. PREPARING TO REGULATE FOR THE NEXT NATIONWIDE EMERGENCY

The preceding Parts have demonstrated how OSHA’s response to the COVID-19 pandemic was shaped by its federalist structure. OSHA offered a weak response to the COVID-19 pandemic during the first year, in its own standard-setting and enforcement, and in its supervision of State Plans. While certain State Plans took the initiative to provide robust regulation and enforcement during the COVID-19 pandemic, others became less effective than OSHA through their meager

enforcement. The result resembled what Congress sought to change with the OSH Act in 1970.

But COVID-19 is not the last emergency OSHA will tackle with the State Plans. As of writing, the pandemic continues. A new, more deadly variant may evolve, and OSHA could be called upon to reinstitute workplace protection measures. COVID-19 will, moreover, not be the last pandemic; new infectious diseases will likely require urgent intervention on a national scale. Other emergencies will also arise as climate change causes rising temperatures and increasingly volatile natural disasters that affect workers. Where OSHA’s standard rulemaking process takes an average of more than seven years to complete, OSHA may find itself seeking emergency methods to counteract imminent risks nationwide. Like COVID-19, these threats will not be confined to the workplace, and the agency will be challenged to respond within the bounds of NFIB v. OSHA and in coordination with the State Plans. What can be learned from OSHA’s response to COVID-19, and how can the federalist worker health and safety system be improved to better react to emergencies going forward? 

A. Unravel the Federalist System

The most radical solution would be to replace the current system of hybrid federal-state system with a state-only or federal-only system. In a state-only system, every state would have a worker safety program, and OSHA would serve in the role of standard-setter and monitor. Under this system, federal funding could be conditioned on the adoption of OSHA regulations or “at least as effective” alternatives. Retaining OSHA as the standard-setter would preserve a degree of uniformity while relieving states of the burden to study and issue standards on complex health and safety topics. OSHA might retain a small staff of inspectors to intervene in State Plans where enforcement is lagging or special skills are needed. Under this system, State Plans could reap many of the benefits demonstrated by the responses of some to the COVID-19 pandemic. Outside the constraints of the federal Administrative Procedure Act and federal judicial precedents, State Plans can conduct more nimble and responsive rulemaking. They can also partner with other state agencies in cases of emergency to enhance their clout, as Washington’s State Plan did during the COVID-19 pandemic. By reverting to state enforcement, all states could regulate worker safety issues—those without plans

298 U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-602T, MULTIPLE CHALLENGES LENGTHEN OSHA’S STANDARD SETTING 2 (2012).

299 This Part does not purport to suggest general reforms to OSHA which are, undoubtedly, also important to improving the State Plan system. For suggestions relating to increasing funding to the agency or worker participation in OSHA regulation and enforcement, see MCGARITY & SHAPIRO, supra note 21, and NOBLE, supra note 21.
would not be barred by federal preemption if they remained effective.

However, for legal and practical reasons, this solution is unlikely to work. First, it closely resembles the system that states could have if they submitted a State Plan. But states have stopped seeking to implement comprehensive State Plans; no state has obtained initial approval for a full public and private sector plan since the 1970s. This suggests states would reject Congressional efforts to return worker safety authority to them. Second, the proposal would raise constitutional commandeering concerns if states were required to run a safety program meeting federal standards. Permitting states to refuse a worker safety program, as a workaround to the commandeering problem, is an unacceptable alternative because it may leave some workers wholly unprotected. Third, because the states would need to retain their programs, OSHA would lose its ability to threaten a takeover, which remains a powerful tool to monitor their behavior in extreme cases, as demonstrated by the Arizona experience discussed in Section I.C. Fourth, OSHA’s rulemaking would still be subject to notice-and-comment, resulting in long lead times for national standards. Finally, one benefit of OSHA is that it provides a locus for interest group advocacy. By devolving authority primarily to the states, worker and business representatives would struggle to efficiently advocate for their constituents’ interests.

The reverse would be for Congress to eliminate State Plans and provide federal enforcement in every state. This would look much like the existing system in OSHA states where the agency operates a central office that conducts rulemakings and overarching policy, while regional offices do local enforcement. First, this option would likely be politically infeasible. State Plans would be reluctant to give up their programs, and the representatives from those states would lobby against it. Moreover, the expense of taking over the State Plans would deter Congress. Second, this proposal would probably result in diminished enforcement nationwide, particularly in the states that have vigorous state programs. The federal government would lose state contributions, and Congress is unlikely to fully replace that funding. Third, this proposal would result in the loss of innovation and creativity in certain participating states, as the COVID-19 pandemic demonstrated. Workers in those states benefited from the local rules and enforcement. And when State Plans choose to regulate, they put a spotlight on what OSHA has not done.

That said, the COVID-19 experience demonstrates that OSHA should learn more from and cooperate more readily with State Plans. State Plans often lead the way with standards, which OSHA should consider adopting. During the pandemic,

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300 OSHA QUICK FACTS, supra note 66.
301 See Printz v. United States, 521 U.S. 898, 925 (1977) (“[T]he Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs.”).
302 Thompson, supra note 23, at 76.
states like Virginia provided models that could have helped OSHA design an emergency and permanent standard relating to COVID-19. Their experience could inform expedited rulemaking on the federal level. OSHA should also encourage State Plans to regulate issues that may be infeasible at the federal level due to politics or administrative delays. State Plans may be able to promulgate rules more efficiently during an emergency, because these regulations may help OSHA build the momentum to act on the same issues, demonstrating that the regulation is not overly burdensome, but rather clarifies employer obligations and facilitates enforcement.

B. Enhance OSHA’s Monitoring Tools

Recognizing that the hybrid system is here to stay, Congress and OSHA should take actions to strengthen the monitoring of State Plans, particularly during emergencies. As demonstrated above, certain State Plans will likely lag in their response to an emergent situation. OSHA should be encouraged to monitor State Plans and provided the tools to make a credible threat if they fall behind. After all, empowering OSHA as an agency is key to strengthening the entire system.

First, Congress should clarify the meaning of “at least as effective,” or OSHA should conduct a rulemaking on the subject. The system of adequacy turns on a comparative measure between OSHA and the State Plans. Yet, there is little clarity about what it means. This is particularly difficult with respect to enforcement. State Plans have long conducted a different kind of enforcement than OSHA—with more frequent violations and lower penalties. Is this equally effective? Calculated in terms of deterrence, as this Article does, it can be. But Congress has never made this determination. Moreover, some members of Congress, policymakers, and advocates have called for effectiveness to be defined in terms of outcomes— injury and illness rates. But current data do not allow for rigorous comparison on these lines. If this is what Congress means by “effective,” it should say so and fund a better national survey. Having clarity on these points is particularly important during an emergency. Where structural considerations, such as rulemaking and inspection authority, may assure Congress that a State Plan has the tools it needs to be effective, they do not ensure that a State Plan will act vigorously to meet a new hazard. For OSHA to make such determinations quickly and cheaply, it must have a more concrete idea of what it would mean for a State Plan to be effective. Otherwise, when the moment for speedy accountability arises, OSHA will have difficulty justifying its own metrics and standards to the State Plans.

Congress should also authorize OSHA to use State Plan funding as a lever to ensure effectiveness. As written, the OSH Act implies that OSHA cannot alter the
funding scheme when State Plans are insubordinate but not abdicating. Because State Plans rely heavily on federal funding—constituting up to 50 percent of their annual budget—OSHA could condition funding on State Plans meeting targets of effectiveness or implementing standards. Funding could be a far more credible threat than withdrawing authority or reconsidering final approval. In an emergency, OSHA could threaten to withhold funding if a State Plan does not perform, for example, a given number of proactive inspections, or if the federal agency receives a credible CASPA. The agency could also use grants in these cases to encourage State Plans to enforce more vigorously.

Finally, Congress should change the meaning of “final approval” to provide OSHA with concurrent jurisdiction. Instead of giving State Plans exclusive jurisdiction over worker protection, states should have primary jurisdiction, with OSHA able to intervene in case of lacking enforcement. Even the process of reconsidering “final approval” may be too slow and uncertain in case of an emergency like COVID-19. Rather, immediate entry of OSHA inspectors could be a more meaningful and expeditious means of control. It would also enable OSHA to supplement and supervise a given State Plan in an emergency. This authority would further allow the agency to help the State Plan through the period. OSHA had done this successfully in a state under an “operational status agreement,” a form of concurrent jurisdiction under which seven State Plans still operate. After a deadly chicken plant fire in North Carolina, OSHA temporarily asserted partial control over the state’s workplace safety plan in what was seen as a “clear rebuke of the state program.” This encouraged North Carolina to supply the agency with additional resources. Indeed, the goal may not be that OSHA actually sends its own inspectors to help; rather, the credible threat of intervention may convince politicians in certain states to step up in an emergency. For example, they might, as Washington OSHA did during the pandemic, recruit officers from other parts of the state government to assist them with fielding complaints and conducting enforcement. Urging the state agency to use its own resources would be a profitable result for workers.

C. Strengthen OSHA’s Emergency Rulemaking Authority

As argued above, standards are key to uniform, nationwide OSHA enforcement. Yet the politics of OSHA are such that adoption of these standards is at the discretion of appointed officials, whose politics may favor guidance over

303 See OSH Act § 23(f)-(g), 29 U.S.C. § 672(f)-(g).
304 Id.
305 OSHA Quick Facts, supra note 66.
306 McGarity & Shapiro, supra note 21, at 174-75.
307 Huber, supra note 26, at 187.
explicit rulemaking. How then can agency action be encouraged? Some statutes contain legal rights to sue over agency inaction, such as by providing deadlines. These can give interested parties a means to urge agency action. But they are also difficult for constituents to enforce in court where the agency leaders oppose the action, because courts are hesitant to dictate agency priorities.308

Professor Nancy Modesitt has offered a set of worthy recommendations for easing OSHA’s ability to promulgate emergency standards.309 First, Professor Modesitt argues that Congress should permit OSHA to issue such a standard where it would be “reasonably likely to be effective in reducing the risk,” as opposed to strictly “necessary,” a hurdle that has caused prior ETSs to be struck down.310 Second, she argues that Congress should loosen or eliminate the requirement that OSHA replace the standard with a permanent rule in six months, giving OSHA authority to issue an emergency rule for a limited time only.311 Finally, she argues that Congress should confirm OSHA’s authority to modify the standard in light of new information.312 This set of reforms would reduce the likelihood that OSHA’s emergency standards would be defeated by the courts and assuage some of the concerns about flexibility and information costs.

Congress could further require State Plans to adopt ETSs immediately after OSHA issues them. If they wish to implement an “as effective” alternative, they should be required to enact it as a replacement for the federal rule. Or Congress could give OSHA authority to enforce the standard if the State Plan drags its feet. This would help ensure that when OSHA does adopt an emergency standard, State Plans will be unable to argue that they are slowly developing their own alternatives.

CONCLUSION

The story of OSHA and the State Plans is a story about the choice between state autonomy and federal control. This Article seeks to contribute to this fundamental debate by highlighting an often-overlooked example at a critical moment. There is much more to be studied, elaborated, and evaluated about the role of OSHA during the pandemic and the relationship between OSHA and the State Plans. It is the author’s hope that this Article encourages others to continue the research.

308 See NRDC v. Train, 510 F.2d 692, 712-14 (D.C. Cir. 1974) (discussing the difficulties in mandating a federal agency to meet a congressionally imposed deadline for regulation).
309 Modesitt, supra note 7.
310 Id. at 229.
311 Id. at 231.
312 Id. at 230.