

2020

PUBLIC HEALTH LAW
**VIRTUAL
SUMMIT**

**COVID-19 Response
and Recovery**

September
16-17

**Panel:
Safety for Care Facilities and Essential Workers**

***Implementation and Enforcement of
Quality and Safety in Long-Term Care***

Tara Sklar, JD, MPH
Professor of Health Law
Director, Health Law & Policy Program
University of Arizona College of Law

Overview

Three major missteps

Staffing; Infectious Disease Controls and Prevention;
Emergency Planning and Accountability

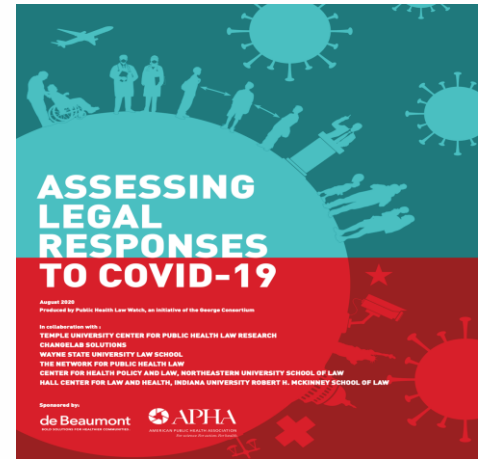
“Superspreaders”

State experiences

- Indiana and New York

Recommendations

An industry ripe for disruption



CHAPTER 16 • IMPLEMENTATION AND ENFORCEMENT OF QUALITY AND SAFETY IN LONG-TERM CARE

Implementation and Enforcement of Quality and Safety in Long-Term Care

Tara Sklar, JD, University of Arizona James E. Rogers College of Law

SUMMARY Long before the new coronavirus struck, nursing homes and other long-term care facilities have had declining quality care that coincides with inadequate staffing and rampant infections. These pre-pandemic conditions increased the vulnerability of these facilities to an infectious disease outbreak. As the elderly death toll rises into the tens of thousands, an overdue national discussion on how to prioritize long-term care in the US has emerged, revealing an opportunity to better link quality care metrics with sufficient reimbursement and meaningful regulatory oversight. However, the opposite approach has also surfaced, which would allow the status quo to continue and may erode the minimum standards of care that currently exist. This concerning trend is on the rise with efforts to relax the Centers for Medicare and Medicaid Services (CMS) regulatory authority over nursing homes by waiving requirements and reducing enforcement penalties. In addition, states are passing measures to limit liability exposure for nursing homes during COVID-19 and similar protections are under consideration at the federal level, even as infection rates climb and there is no evidence of frivolous lawsuits. While political will is uncertain, public outcry is ready for legislative reform that will lead to better later-in-life care. The stakes have never been higher – act now and pass laws that connect funding with regulation to support quality care in nursing homes during and after the COVID-19 pandemic – or continue to condone practices that allow infection to spread and take many lives before their time.

Introduction

Across the country, nursing homes and long-term care facilities struggle with how to contain the coronavirus outbreak. Part of the difficulty relates to conflict between federal, state, and nursing homes that emerged as thousands of COVID-19 infections and related deaths became linked to these facilities. This Chapter identifies and reviews the major missteps in response to COVID-19 that were facilitated by laws and regulations (or lack thereof) and provides recommendations for how to better control an infectious disease outbreak through improving quality care in long-term care.

Major Missteps

The following three areas: staffing, infectious disease controls and prevention, and emergency planning and accountability, require strengthened legislation and regulatory oversight to curb the spread of COVID-19.

Staffing. The pandemic staffing levels fell far short of what is recommended (Harrington et al., 2020). Previous proposals to mandate minimum staffing levels have failed across the states

largely due to the nursing home industry citing cost concerns. This staffing shortage led to undue pressure for workers to continue working in potentially dangerous conditions, and low wages have made it difficult for workers to earn sufficient income without working at multiple facilities. Specifically, recent evidence finds certified nursing aides (CNAs) have unwittingly passed on the virus, as an estimated 55% to 17% work at more than one long-term facility and are commonly referred to as “super-spreaders” (David Van Houtven et al., 2020).

CNAs are primarily immigrants and women of color who earn low wages, and report fear of reprisal for requesting paid sick leave and PPE. These workers represent systemic racial, gender, and economic inequalities in nursing home care that has long been recognized to the shadows, despite their essential role in caring for older Americans. In the midst of COVID-19, some states (major wage increases or hazard pay) to encourage CNAs to work at only one facility. Adequate PPE and paid sick leave laws with enforcement could further reduce the spread of COVID-19, along with some of the inequities facing this vulnerable population.

© 2020 PUBLIC HEALTH LAW RESEARCH CENTER • AUGUST 2020 • WWW.CENTERSFORPUBLICHEALTHLAW.COM • 163

COVID-19 Exposed Long-Standing Industry Problems

Staffing

Infectious
Disease
Controls &
Prevention

Emergency
Planning and
Accountability

Inadequate levels
Turnover
Benefits

Over 80% Nursing
Homes cited for poor
infection control.
2019: 380,000 deaths

Limited oversight
Data
Resources

Residents and workers in long-term care

The New York Co.

Opinion

How Many of These 68,000 Deaths Could Have Been Avoided?

Nursing home residents and staff members account for 40 percent of coronavirus-related deaths in the U.S. A justifiable reason for that.

Editorial Board

The board is a group of opinion journalists whose views are not necessarily shared by The New York Times. The board debates and certain longstanding values.

1.4 million people reside in 16,000 nursing homes and 29,000 long-term care residential communities

1% of the US population, but over 40% of the US COVID-19 related deaths are linked to nursing homes

Majority of staff are certified nursing aides, and they earn between: \$15-20,000/year

At least 20% of aides work in more than one long-term care facility



Immigrant Workers

Latina woman in Fairfax County, Virginia.

*“We have to go out to work,” she said. “We have to pay our rent. We have to pay our utilities. **We just have to keep working.**”* [NYT, July 5, 2020](#)

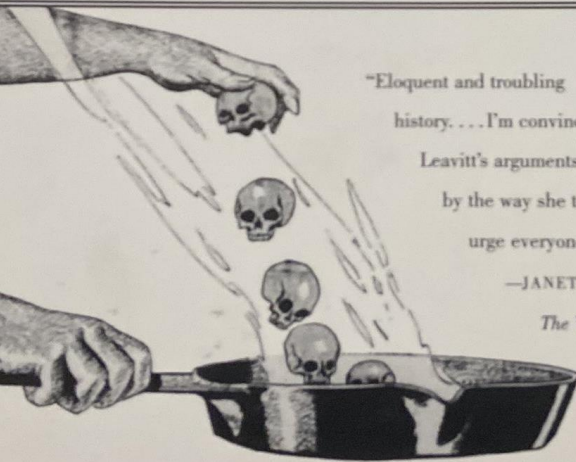
NJ Health Commissioner Judith Persichilli [rejected the suggestion](#) of limiting where nurse aides may work.

*“We don’t anticipate telling CNAs they **must work in only one organization...** There’s a reason why they’re working in several places. It’s because the **wages are not enough** to support what they need to support their families, put food on the table, and they’re **working their little hearts to the bone here, just trying to survive.**”*

Typhoid

By War

tive to the Public's Health



"Eloquent and troubling
history. . . I'm convinced by
Leavitt's arguments, fascinate
by the way she tells this s
urge everyone to read l
—JANET GOLDIN,
The Women's Re

Judith Walzer Le

Salma's story...

- Multiple nursing homes; 10-12 hrs/day
- Minimum wage; no hazard pay
- Hurdles to paid sick leave
- Retaliation fear; economic security; immigration enforcement
- Lack of access to healthcare

We are **repeating** the pattern of punitive disease control:

The focus is on the need for **protection against individuals** who threaten the public's health, rather than **the conditions** those workers find themselves forced to endure.

Indiana Experience:

When funds are not tied to quality or staffing metrics

About 60% of Indiana's COVID-19 deaths have been nursing home residents. (Emily Hopkins, IndyStar)

In 2019: Indiana received more supplemental Medicaid funding for nursing homes than any other state (\$679 million), but ranks 48th in the country for staffing. 70% of those funds were redirected away from nursing homes.

CMS – Medicaid supplemental payments have doubled, proposed CMS rule, Medicaid Fiscal Accountability Regulation, was rescinded on 9.14.20.

HHS announced \$4.9 billion nursing home allocation, with \$50,000 per facility, plus \$2,500 per bed on 5.22.20.

New York Experience:

Don't save hospitals with nursing homes

Lack of coordination between levels of government and the long-term care industry.

“No resident shall be denied re-admission or admission to the NH [nursing home] solely based on a confirmed or suspected diagnosis of COVID-19.”
([Order](#) issued 3.10.20 and rescinded 5.10.20)

Governor Cuomo insisted that it's “not our job” to ensure that the nursing homes had adequate PPE.”

Instead, New York passed: [Emergency or Disaster Treatment Protection Act of 2020](#)



Also, [Chapter 27](#) in COVID Policy Playbook on Liability and Liability Shields by Nicolas Terry.

Recommendations

Accountability and Transparency are not “punishments”

If I were a private investor, then a company would provide reports and correct any errors that could result in harm to customers or lawsuits.

Why is the expectation so much lower when it comes to CMS/Medicaid?

Consequence of minimal oversight and enforcement:

It rewards bad actors and overall harms the industry.

Why should high-performing facilities be treated the same as those that are failing to protect their residents and staff?

TODAY – Sept 17, 2020: CMS released Coronavirus Commission for Safety & Quality in Nursing Homes Reports includes no less than **27 recommendations** with accompanying action steps.



Coronavirus Commission for Safety and Quality in Nursing Homes

Purpose: Independent 25-member Coronavirus Commission was to solicit lessons and provide recommendations to *improve infection prevention and control measures, safety procedures*, and the *quality of life* of residents within nursing homes.

Urgent need to train, support, protect, and respect **direct-care providers**.

Create **guidance** to owners and administrators that is more actionable AND to **obtain data** that is more meaningful for action and research

Ongoing **supply** and affordability dilemmas related to testing, screening, and PPE

A call for **transparent and accessible communications** with residents, their representatives and loved ones, and the public.

Federal and state governments

Staffing, Benefits with Anti-Retaliation Protection and Enforcement

- Standardize fed/state paid sick leave
 - [PAID Leave Act \(model federal legislation\)](#)
- Standardize robust retaliation laws
- Fund enforcement; local agencies

Local

Education & Outreach

- Workers—working together “know your rights” campaigns
- Employers—creating dialogue

Industry is ripe for disruption

Develop Purpose-driven, Caring,
Passionate **Staff**

**Provide Technology to Increase
Connections,** Aid Efficiency and
Optimize Health

Establish Trust by Being Prepared
to Respond to Emergencies and
Unexpected Events



Forbes

227 views | Sep 15, 2020, 01:54pm EDT

How To Fix Senior Living

Next Avenue Contributor

Next Avenue Contributor Group ⓘ

Retirement

The PBS website for grown-ups who want to keep growing

By Richard Eisenberg, [Next Avenue](#) Managing Editor

Reminder

Less than 10% of the population that needs long-term services rely solely on paid care services.

Long-term care needs to be adequately funded regardless of whether it is delivered in a facility or through home-and-community-based services.

Preparing to Age in Place: The Role of Medicaid Waivers in Elder Abuse Prevention

Tara Sklar, JD, MPH and Rachel Zuraw, JD, MBe*

I. INTRODUCTION

"All the money my parents saved over their lifetimes and planned to pass onto their children and grandchildren was spent in two years on nursing home care. The day my mother passed was the day she became Medicaid eligible."

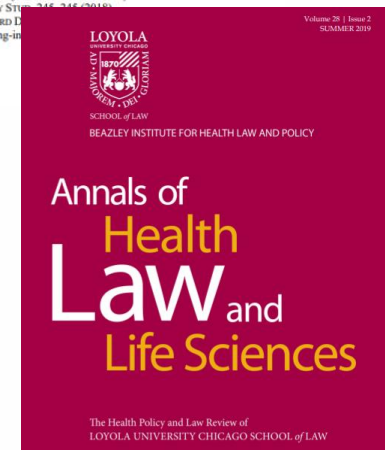
- Frank Petruzzi, Youngstown, Ohio
(retired attorney)

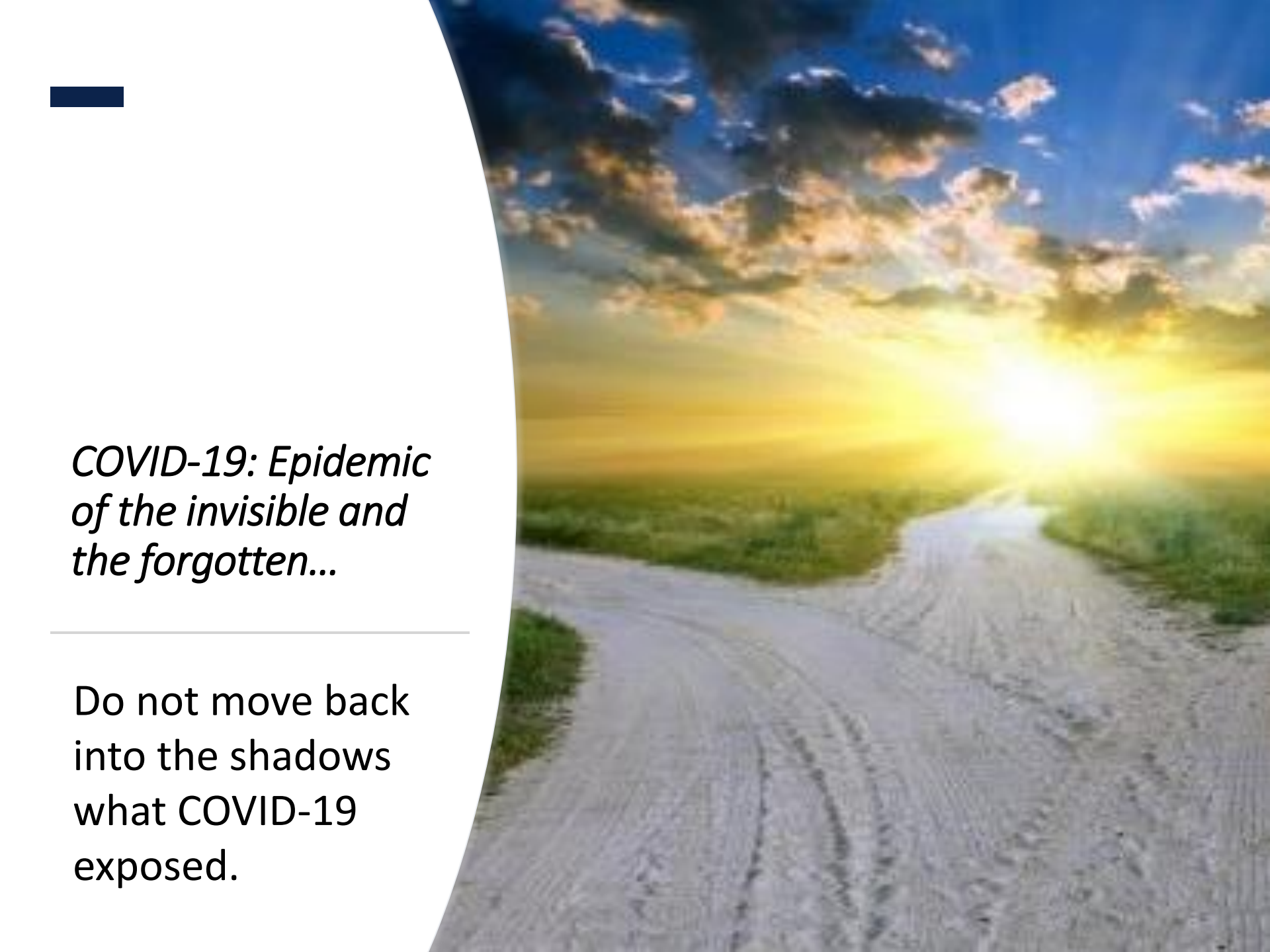
Financing for long-term care in America has been described as the greatest gap in retirement planning.¹ The population growth trajectory shows a large and increasing need for accessible long-term care options as the cost of care continues to climb.² Aging in place is gaining primacy as a path forward, enabling older adults to remain in their home as they age; this practice can contain costs associated with long-term care, and it is responsive to popular preferences of adults aged sixty-five and over.³ However, there is still much to learn about how to manage aging in place to provide the greatest benefit to this population.

* Tara Sklar, Professor of Health Law, University of Arizona James E. Rogers College of Law and Rachel Zuraw, Lecturer, University of California, Berkeley, School of Law. Special thanks to Elise Phalen for her excellent research assistance. We appreciate the helpful comments and suggestions from Barbara Atwood, Jordan Neyland, Christopher Robertson, Nadia Sawicki, Roy Spece, Sidney Watson, participants at Loyola University of Chicago School of Law, 2018 Beazley Symposium on Health Care Law and Policy, the 2019 Association of American Law Schools, Law, Medicine, and Health Care Works in Progress Session for New Law and Medicine Scholars, and the 2019 Arizona Law Scholarly Workshop.

1. Richard L. Kaplan, *Retirement Planning's Greatest Gap: Funding Long-Term Care*, 11 LEWIS & CLARK L. REV. 407, 450 (2007).
2. Carli Friedman et al., *Aging in Place: A National Analysis of Home- and Community-Based Medicaid Services for Older Adults*, J. DISABILITY POL'Y STUDY 217-246 (2018).
3. *Id.* at 249, 254; *The Value of Aging in Place*, USC LEONARD D. SCHLESINGER CENTER FOR GERONTOLOGY, <https://gerontology.usc.edu/resources/articles/the-value-of-aging-in-place/> (last visited Feb. 2, 2019).

195



A photograph of a dirt road winding through a field towards a bright sunset. The sun is low on the horizon, creating a golden glow and casting long shadows. The sky is filled with scattered clouds, some illuminated by the setting sun. The overall mood is one of hope and a bright future.

*COVID-19: Epidemic
of the invisible and
the forgotten...*

Do not move back
into the shadows
what COVID-19
exposed.



THE UNIVERSITY OF ARIZONA
JAMES E. ROGERS COLLEGE OF LAW

Health Law

Thank you
Thoughts, questions, suggestions...

trsklar@arizona.edu

 @azlawhealth

 @trsklar

Protecting Essential Workers During COVID-19

Ruqaiijah Yearby, J.D., M.P.H.

Executive Director and Co-Founder of the
Institute for Healing Justice and Equity

Professor of Law and Member of the Center
for Health Law Studies

Saint Louis University, School of Law



Roadmap

❖ Essential Workers

❖ Federal Government

❖ State Governments

❖ Solutions

Essential Workers

- ❖ Most essential workers employed in health care (30%) and in food and agricultural (21%)
- ❖ 76% of health care workers are women, 52% of food and agricultural workers are racial and ethnic minorities
- ❖ Since women and racial and ethnic minorities account for a majority of essential workers, they have been disproportionately harmed by COVID-19

COVID-19 Impact

- ❖ Over 59,079 food and agriculture workers have tested positive for COVID-19 and at least 252 have died (The FERN)
- ❖ More than 161,184 health care personnel have tested positive for COVID-19 and 705 have died (CDC)
- ❖ Agricultural workers at a pistachio farm in California didn't know workers had tested positive for COVID-19 until they learned it from the media

Federal Government

- ❖ OSHA and the 21 states with OSHA-approved plans have the power to require employers to provide employees with personal protective equipment and develop a respiratory protection standard to prevent occupational disease (29 C.F.R. § 1910.134)
- ❖ Employers have a “general duty” to provide employees with a place of employment free from recognized hazards that are causing or likely to cause death or serious harm (“Occupational Safety and Health Act,” 1970)

CDC & OSHA

- ❖ Issued late: Guidance for agricultural workers was not issued until June 2, 2020. By that time over 2,076 agricultural workers in New York, 1,948 in California, and over 1,000 in Illinois, Texas, Iowa, Washington, and Minnesota were infected with COVID-19 (Sowder, 2020).
- ❖ OSHA/CDC issued advisory guidelines, NOT mandatory, which don't require testing

CDC & OSHA

- ❖ **Minimal Inspections and Fines: 2/10,000**
 - ❖ \$13,494 fine for Smithfield that made \$14 billion in net revenue in 2019 for at least 1,294 infected, 43 hospitalized, and 4 dead (Sioux City Journal/Wash Post)
 - ❖ \$15,615 fine for JBS that made \$51.7 billion in net revenue in 2019
 - ❖ Companies and NAMI challenge findings based on OSHA/CDC guidance

State Governments

- ❖ St. Louis County stay at home order included social distancing mandates and other measures to stop the community spread of COVID-19, but not mandatory for essential businesses
- ❖ Essential businesses not required to adopt policies to stop the workplace spread of COVID-19, like providing testing, personal protective equipment, physical barriers for social distancing, and heightened cleaning and disinfection of the workplace

Solutions

- MI ordered COVID-19 preparedness and response plans for migrant housing operators and mandatory testing of farm workers
- ❖ OR banned the use of bunk beds in guest worker housing
- ❖ NY will dispatch mobile testing teams to farms in rural counties
- ❖ CA and WA require agricultural employers with more than 500 employees to provide up to 2 weeks of emergency paid sick leave

Short-Term Solutions

- ❖ OSHA should issue emergency temporary standard
- ❖ Mandate testing and Partner with community groups for testing
- ❖ Make complaint data publicly available and disaggregate by industry to determine businesses that are hotspots for COVID-19

Long-Term Solutions

- ❖ Revise Emergency Preparedness Laws to address employment conditions
- ❖ Health and Safety Protections
- ❖ Testing of workers at hotspots
- ❖ Allocation of resources (masks, personnel, funding) to essential workers

Additional Readings

- ❖ Ruqaiijah Yearby, *Protecting Workers that Provide Essential Services*, COVID-19 LEGAL ASSESSMENT PROJECT, <https://www.publichealthlawwatch.org/covid19-policy-playbook>
- ❖ Ruqaiijah Yearby & Seema Mohapatra, *Law, Structural Racism, and the COVID-19 Pandemic*, J. OF LAW AND THE BIOSCIENCES (May 30, 2020) <https://doi.org/10.1093/jlb/ljaa036>
- ❖ Emily Benfer, Seema Mohapatra, Lindsay Wiley, and Ruqaiijah Yearby, *Health Justice Strategies to Combat the Pandemic: Eliminating Discrimination, Poverty, and Health Inequalities During and After COVID-19*, YALE J. HEALTH POLICY, LAW, AND ETHICS (forthcoming 2020) <http://dx.doi.org/10.2139/ssrn.3636975>