Pandemic Protections

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Mechele Dickerson, *Protecting the Pandemic Essential Worker*, 85 **Law & Contemp. Probs.** 177 (2022).

For nearly two and half years, we have all been grappling with a global pandemic that has significantly impacted individuals, families, businesses, and global economies. Although COVID-19 has affected everyone in some way, the pandemic's detrimental impact has been disproportionately felt in low income communities and communities of color. According to Professor Mechele Dickerson, this unfortunate reality is due in part to the fact that many people in these communities were deemed to be essential workers who lacked adequate protections during the pandemic. In her recent thought-provoking essay *Protecting the Pandemic Essential Worker*, Professor Dickerson argues that federal and state agencies should mandate that businesses enact plans to provide necessary safety protections for low wage essential workers in light of workers' limited ability to obtain such protections for themselves via employment contracts or collective bargaining agreements.

Professor Dickerson begins her essay with a discussion of how workers within certain industries became designated as essential workers during the pandemic and how such designations exposed workers to greater health risks. She recounts how following President Trump's essentiality declaration, states used the Department of Homeland Security Cybersecurity & Infrastructure Security Agency's (CISA) list of "Essential Critical Infrastructure Workers" as their guide when issuing their own declarations, which included workers in sectors such as grocery and convenience stores, first responders, and food and agricultural services. Professor Dickerson asserts that because "COVID-19 declarations transformed generally safe workplaces into potentially lethal ones," the essentiality designation itself exposed essential workers to greater health risks once they entered such workplaces. Unlike other workers who were able to work remotely within the relative safety of their homes, some essential workers, such as those who worked at meat and poultry processing plants with inadequate ventilation and lax masking and outbreak reporting requirements, experienced higher COVID-19 infection and mortality rates, which detrimentally impacted their lives, families and communities.

In discussing "the typical [face to face] F2F essential worker," Professor Dickerson draws much needed attention to the economic and racial disparities that exist between groups of workers and to the social determinants of health, all of which contributed to the disproportionate harms that lower wage and essential workers of color experienced during the pandemic. For instance, with regards to those who could work from home (WFH) during the pandemic and those who could not, she notes that "higher wage workers were more than twice as likely to report being able to WFH compared to lower wage workers. Additionally, college graduates and whites were more likely than non-college workers, Blacks and Latinos to have the ability to WFH." Employers of Black, Indigenous, People of Color (BIPOC) workers were less likely to provide paid leave and health insurance, and according to Professor Dickerson, some essential workers were discouraged from availing themselves of the leave if it was provided. When these disparities are combined with social determinants of health such as income and wealth inequities, neighborhood air and water quality, lack of availability of healthy foods, and less safe working conditions, the resulting disproportionate infection and mortality rates experienced by certain essential workers was sadly not surprising or unexpected.

Professor Dickerson convincingly argues that such detrimental outcomes were also attributable to low wage essential workers' lack of contractual power to demand safer working conditions for themselves and offers several reality checks to demonstrate such. The first concerns the fact that low wage essential workers are unlikely to have employment contracts. As Professor Dickerson acknowledges, they "are instead at-will employees who can be fired without warning for good cause, bad cause, or no cause at all assuming the termination does not violate federal or state labor or anti-discrimination laws." Operating from such a precarious and vulnerable employment position deterred rather than empowered essential workers to demand safer workplaces. Second, most non-remote essential workers are not members of unions and, thus, did not possess the collective bargaining power to successfully protest against unsafe working conditions or demand safer workplaces during the pandemic. Professor Dickerson also asserts that essential workers' bargaining power was further diminished by businesses hiring independent contractors and full-time temporary workers through staffing agencies that did not press for more robust COVID-19 protocols for fear of losing the business as a client.

In light of essential workers' lack of contractual and bargaining power to secure adequate safety protections from businesses during the current pandemic, Professor Dickerson advocates that state and federal agencies take a proactive role to better protect essential workers during future pandemics. "[S]tate and federal health and labor agencies should prepare default [pandemic essential worker] PEW regulations that protect all essential workers (whether classified as employees, temporary, contract, or gig workers and whether U.S. citizens, undocumented, unionized, or at-will) from being forced to choose between being safe or being paid." By devising and mandating uniform, clear rules and specifying when essential businesses must implement them, agencies will provide more effective guidance to assist businesses in making necessary changes to better protect essential workers during future pandemics.

Professor Dickerson's proposal would benefit not only essential workers by creating safer workplaces but also the business itself by reducing uncertainty and guesswork regarding protocols that would need to be implemented should another pandemic occur. Her proposal respects businesses' autonomy by permitting them to proactively devise their own PEW plans provided they do so in consultation with workers or a bargaining unit. This caveat is particularly important considering the previous discussion regarding essential workers' general lack of bargaining power to secure adequate safety protections in the midst of a pandemic. Professor Dickerson's thoughtful and comprehensive proposal also includes a variety of other caveats and recommendations, such as immunity from certain liability, to incentivize businesses to enact PEW plans that will lead to greater protections for the health and wellbeing of essential workers.

As scholars, policymakers, and countless others reflect on the current pandemic in an effort to identify useful lessons and observations from which to learn and improve, Professor Dickerson's essay is an important, helpful, and timely contribution. In it, she centers the pandemic's harmful impact on essential workers, particularly low wage BIPOC workers, and offers proposals to afford them greater protections during future pandemics. In so doing, Professor Dickerson provides valuable tools by which we can lessen rather than exacerbate the many racial and economic disparities COVID-19 exposed in our country and around the world.

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