Hazard Pay for COVID-19? Yes, But It’s Not a Substitute for a Living Wage and Enforceable Worker Protections

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Abstract
The COVID-19 pandemic is exposing critical failures in public and occupational health in the United States. So-called hazard pay for essential workers is a necessary but insufficient response to the lack of workplace protections. The roots of these failures in the weakening of the Occupational Safety and Health Administration enforcement and pandemic preparedness and the dramatic shifts in the economy and labor market in recent decades are explored along with the history of hazard pay. The current prominence of COVID-19-related workplace hazards, and the mobilization by both nonunion and union workers experiencing them, presents opportunities amid the crisis and tragic losses to envision a revival of worker protection measures. Strategies are needed for organizing and legislative advocacy to address the disparate impact of both normal and crisis conditions on low-wage workers, especially women and workers of color.

Keywords
hazard pay, OSHA enforcement, COVID-19, essential workers, fissured workplace

Introduction
With each passing day, the COVID-19 public health crisis becomes more and more an occupational health crisis as well. The early focus was rightfully on direct healthcare providers doing their jobs without either engineered safety measures or necessary and appropriate protective equipment. It quickly became apparent that the broader workforce of “essential” workers in transportation, grocery and retail, food production, and other industries is being exposed to the coronavirus at alarming rates. A perhaps inevitable consequence of this crisis atmosphere is that a number of policy, political, and socioeconomic issues that have historically surrounded occupational safety and health (OSH) have emerged or reemerged in a very acute way. Examples include (1) the merits of regulatory enforcement versus guidelines and consultation from governmental agencies, (2) federal versus state jurisdiction and responsibility, and (3) workers’ compensation for occupational diseases.

Another such issue that many of us in the OSH field mistakenly thought had come and gone is the concept and practice of “hazard pay,” or a wage premium for carrying out job tasks with special risks. In historical context, the widespread calls for hazard pay from a range of workers, activists, and politicians, including progressive ones, are problematic and signal a number of critical failures. To be clear, the scale of disease, death, and intolerable working conditions created by the pandemic make the revival of this concept understandable. However, like many other aspects of our current emergency, we must distinguish between immediate needs and last resorts in the crisis on one hand and policy choices to address when we have the luxury of a more steady state of affairs on the other.

This commentary first addresses the key failures in OSH policy and practice that underlie the calls for hazard pay, both in their immediate manifestation during the pandemic and their recent historical roots. It then provides background and context from the economic and policy literature on hazard pay and more broadly the concept of compensating wage differentials. Finally, it offers lessons for medium- and longer-term
strategies and demands for greater worker protections to obviate the need for hazard pay.

The Immediate Crisis of Workplace Safety and Health: How We Got Here

The Occupational Safety and Health Act of 1970 (OSHA) provides that:

Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees [Sec. 5(a)(1)].

This is known as the General Duty Clause. Despite repeated deregulatory assaults on this statute over the five decades since its passage, it has surprisingly remained intact as the letter of the law. The OSHA Act was meant to take wage compensation for hazardous jobs out of the equation in favor of “feasible” controls of the hazards of such jobs through the issuance and enforcement of standards for these recognized hazards. That we are having the hazard pay discussion again reflects a number of key interrelated failures.

OSHA Standard Promulgation and Enforcement

While OSHA can legally cite employers under the General Duty Clause, practically speaking the case law that has developed over the years makes such citations much more difficult to sustain than citations under standards for specific hazards. However, the promulgation of new or updated regulations pertaining to specific hazards or exposures has come to a virtual standstill in the last twenty years due to the opposition of industry and its political and legal allies. An all-too-relevant example is a regulation for airborne infectious agents that OSHA began to develop in 2010 following the H1N1 flu pandemic and soon after the state of California in 2009 issued its own Aerosol Transmissible Disease state standard for healthcare and related workplaces. Federal OSHA during the Obama administration conducted a number of steps of rulemaking but never issued a proposed standard. No further work on the regulation has taken place under the Trump administration. More recently, the American Hospital Association led the lobbying effort against inclusion of a provision in the COVID-19 pandemic response legislation (CARES Act) mandating that OSHA issue an emergency temporary standard, as permitted under the Occupational Safety and Health Act of 1970, that would require healthcare employers to develop infection control plans for the COVID-19 virus. Effectively this would make Centers for Disease Control and Prevention and other guidelines for worker protection regulations enforceable by OSHA. This OSHA regulatory paralysis is not limited to infectious disease threats. In the healthcare sector alone, the demonstrable problems of workplace violence directed at healthcare workers and the risk of injury from patient handling have been ignored or delayed by many years in the federal regulatory process.

Beyond the failure to issue regulations, OSHA enforcement activity exercised through its federal inspectorate and state counterparts is in general decline and in recent history is explicitly avoided in crisis situations. The absence of OSHA inspectors in healthcare and other essential workplaces during the COVID-19 pandemic mimics the hands-off policy OSHA took in the aftermath of the World Trade Center attacks. (Disclaimer: The focus of this essay is on federal OSHA. A few individual state plan states may be outperforming federal OSHA on regulations and enforcement, and the intent is not to slight them.)

Finally, it should be noted that more than three years into the Trump presidency OSHA is being led by an interim administrator, with Trump and the Senate never having advanced and approved a nominee to permanently run the agency. The current Secretary of Labor, the cabinet office with authority over OSHA, is Eugene Scalia, a corporate attorney who has spent much of his career leading the fight against OSHA regulations.

Pandemic Planning Failure

This, then, is the context in which the COVID-19 pandemic emerged in January 2020. The potential for a viral influenza pandemic has been widely recognized in the United States and internationally since at least 1997 when the avian (H5N1) virus appeared in human populations in Hong Kong. The U.S. Department of Health and Human Services developed a Pandemic Influenza Plan in 2005 and has updated it a number of times since, most recently in 2017. Multiple pandemic simulations, most involving influenzas but closely applicable to novel coronaviruses, were held as recently as fall 2019 and revealed numerous serious gaps in availability of needed medical and protective equipment should the real thing occur. The failure to stockpile and distribute the necessary quantity and quality of protective equipment for frontline employees in healthcare and other essential occupations and industries quickly manifested itself in the COVID-19 outbreak. The impact has been nothing short of devastating. An especially sad spectacle has been the Centers for Disease Control and Prevention betraying its very name by relaxing standards for safe workplace practices for essential workers, not based on science but rather on lack of appropriate protective equipment and the need to keep adequate numbers of
healthcare and “critical infrastructure” workers on the job. The President’s hesitancy to use the Defense Production Act to remedy the shortages of protective equipment and medical devices was inexcusable and left states, unions, and individual companies in a mad scramble for needed equipment.

The Inverted Hierarchy of Controls

At this point, it is important, especially for those unfamiliar with the principles and practice of OSH, to introduce the fundamental framework of the field, the hierarchy of controls. This holds that hazards are best controlled or eliminated in a systematic fashion through engineering, redesign of processes and equipment, and substitution of less hazardous for more hazardous materials. Negative pressure isolation rooms and testing facilities designed with no direct contact between providers and patients are examples relevant to the COVID-19 pandemic. At the secondary level are administrative controls, such as training workers in safe operating practices and limiting time of exposure through scheduling. Stay-at-home orders, six-foot distancing, and hand hygiene best practices are examples of administrative controls for the entire population as well as workers. The lowest tier and least preferred level of control is personal protective equipment (PPE) such as respirators and face shields, hearing protection, and protective clothing. Some protective measures may span the line between engineering and PPE, an example being the Plexiglas panels installed to separate grocery clerks from customers.

In the pandemic, we see an overwhelming reliance on the lowest, least preferred method of control, PPE. The hierarchy is based on a number of principles including that workers are human, and humans make mistakes so “engineering in” exposure reduction and redundancy of protection is superior to relying on worker behavior to prevent injuries and illnesses. A clear relationship exists between the hierarchy of controls and an approach to worker protection through ergonomics, a field that attempts to optimize the match between worker capabilities and limitations on one hand and the work and task environment, including physical, cognitive, and psychosocial demands, on the other.

The federal government’s failure to replenish stockpiles of the needed N95 masks and inexplicable resistance to using its Defense Production Act authority, even after the scope of the protective and medical device (ventilator) shortage was well known, left healthcare and other essential workers in an enormously vulnerable position. Once we are heading down the slippery slope from the top of the hierarchy downward, we are not only increasing workers’ exposure but also making it harder for them to do their intended job. To be fair, it should be noted that healthcare and related personal service jobs that require person-to-person contact are often more reliant on work practice interventions, like handwashing and PPE, than, for example, manufacturing and assembly jobs. But even with this caveat, the failure of exposure prevention measures has been unforgivable.

The Fissured Workplace and the Essential Workforce

The U.S. workforce and labor market have undergone a major transformation since the beginning of the OSHA era. What David Weil has labeled the “fissured workplace” presents us with an increasingly precarious workforce enmeshed in multiple layers of subcontracting with tenuous attachment to employment-based benefits or even an identifiable employer. Our regulatory and safety net regimes have failed to adapt to these conditions.

Federal and state laws that regulate employment, often dating back to the first half of the twentieth century, assume straightforward and clear employee/employer relationships. They make presumptions about responsibility and liability similar to those we make as customers, presumptions that ignore the transformation that has occurred under the hood of many business enterprises. Traditional approaches to enforcing those laws similarly ignore the myriad new relationships that lie below the surface of the workplace. As a result, the laws crafted to safeguard basic standards, to reduce health and safety risks, and to cushion displacement from injury or economic downturn often fail to do so.

In a not unrelated development, the dramatic decline of trade union membership and collective bargaining over this period has diminished a significant voice advocating for worker protection and hazard regulation and providing safety and health education. Union density as a percentage of total wage and salary employment peaked at about 35 percent in the United States in the mid-1950s and has declined to 10.2 percent in 2019, with the density percentage in the private sector down to 6.2 percent.8,9 Many workers are on their own without either benefits or a collective voice to advocate for them.

A critical aspect of this increasingly precarious and low-wage workforce that the pandemic has shown in stark relief is the racial and gender composition of what has been designated the essential workforce. Essential workers, both in urban and some rural settings, are heavily persons of color, immigrants, and women. While not all essential workers are low-wage, for example, registered nurses and doctors, the healthcare workforce is overwhelmingly female. Immigrants constitute 26 percent of home care and personal aides to the
a population at extremely high risk for infection. Essential jobs in the meatpacking industry are dominated by persons of color and immigrants. Urban transportation workers in many parts of the country are heavily African-American, and agricultural workers are overwhelmingly immigrants, largely Spanish speaking. The Center for Migration Studies estimates that nearly twenty million immigrants, 69 percent of all immigrant workers in the United States, work in “essential critical infrastructure” categories.

This workforce has received an unusual degree of attention as the pandemic has taken hold, and the nature of this attention is instructive. Media, politicians, and local populations offered well-deserved paean to the heroism of these workers in the most intense stretches of the pandemic, particularly to those staffing hospitals and treating thousands of very sick and dying patients. Transportation and retail workers who are very much in the public eye have also been hailed for maintaining essential functions at considerable risk to themselves. Some employers offered wage increases in recognition of the difficult conditions of work, and this is where much of the discussion of hazard pay arose.

However, in the last week of April, as pressures to reopen additional economic sectors built, the posture of some federal and state government officials and entities toward these groups of workers shifted. The case of the meatpacking industry is probably the most dramatic. Beef, pork, and poultry plants in numerous states became sites of major spread of COVID-19 cases. On April 13, the Smithfield pork plant in Sioux Falls, South Dakota had 350 positive cases in a workforce of 3700, accounting for 40 percent of all COVID-19 cases in the entire state. A shift in narrative accompanied the closure of this plant and numerous others like it. From the President on down the emphasis became the threat to the food supply and the potential costs to corporations like Smithfield if they were held liable for all of these cases. A presidential executive order on April 28 invoked the Defense Production Act to reopen the meatpacking plants under Centers for Disease Control and Prevention and OSHA guidelines and forbade state and local authorities from closing down such plants. (Whether the irony of doing this on Worker Memorial Day, an annual event to honor workers who have been killed on the job, was intended or not is unknown.) States announced moves toward denying unemployment compensation to workers who refused to return to their jobs at reopened plants due to fears of becoming infected. U. S. Senate leader Mitch McConnell announced that any further legislative aid packages related to COVID-19 would have to contain provisions to shield employers from liability claims by employees who became ill or died. In rather breathtaking fashion, the essential workers, many of them immigrants and people of color, went from being saluted as heroes to being labeled by implication as money-grubbing lawsuit plaintiffs.

To summarize, the COVID-19 pandemic struck U.S. workplaces in a way that made those defined as essential workers extremely vulnerable to exposure and infection. OSHA regulations were inadequate, and enforcement was almost nowhere to be found. The Trump administration and many employers in healthcare and beyond failed to prepare for a pandemic, some form of which had been predicted for close to fifteen years, in terms of insuring the availability of testing, protective equipment, and treatment resources. The U.S. economy and labor market had followed a path for many decades of stagnant wages, declining benefits, increased inequality, and low rates of unionization for a large proportion of the workforce. This segment of the workforce consists disproportionately of people of color, immigrants, and women, and, ironically, these demographics dominate many of the sectors of the economy defined as essential infrastructure sectors under COVID-19. The absence of other protections, therefore, makes it not surprising that hazard pay for these workers became an often-voiced demand.

Hazard Pay: Concept, History, and Reality

Hazard pay is completely outside the framework of the hierarchy of controls as it posits a pure market mechanism to allocate or avoid risk. It falls into a category that economists call compensating wage differentials, a theory that originates with Adam Smith, the father of free market economics. The theory holds that jobs with “disagreeable” characteristics, including hazards or unpleasant working conditions, will command higher wages because, other things being equal and labor markets being perfectly competitive, such a premium will be needed to attract workers to that job. Prior to the introduction of workers’ compensation systems in the United States in the 1910s, the employee’s “assumption of risk” was in fact an employer defense against damage suits for occupational injury or death. Compensating differential theory would argue that the risk had been priced into the wage so no more was due the employee injured or killed on the job. An extensive literature exists in economic and policy circles, and a full review is well beyond the scope of this essay. But a brief summary and historical context is important to the current debate.

Hazard pay was quite common in blue-collar occupations prior to and in the early years of OSHA, in both explicit and implicit ways. Bureau of Labor Statistics data indicate that 15 percent of large union contracts in the early 1970s had explicit hazard pay provisions covering at least some workers. In many large manufacturing industries, job hazards were also one criterion in job evaluation and classification systems that
determine relative wage rates, an example being the steel industry. They may remain embedded in some systems to this day. (This is likely a factor in some legacy gender pay inequities, but that’s a different article.) Hazard pay is somewhat more explicit in jobs and sectors with inherent risks such as firefighting and law enforcement.

Ironically, the most widespread current use of a pay premium for hazardous work may be the hazardous duty (or environmental differential) pay provision in the federal government personnel system. The types of conditions that qualify are named in Office of Personnel Management regulations, and agencies apply them to their own employees. Some of them make good sense, like employees being compensated with a premium for government travel into a war zone or a region with high threat of terrorist incidents. Others may actually relate directly to COVID-19 conditions, including biological agents like Ebola and other viruses.

A large number of econometric studies have sought to empirically demonstrate the existence of compensating differentials for job hazards. Viscusi and Aldi argue that a substantial body of research over thirty years has confirmed Smith’s theory of compensating differentials for such hazards. Certainly the principle operates in some situations. But to the noneconomist, and perhaps some economists as well, too much of this literature reads like a fairy tale. It celebrates the freedom of choice for both employees and employers to “maximize their utility” by workers selecting jobs based on their risk tolerance in return for additional compensation for higher risks. Companies then control hazards only to the point necessary to attract enough workers willing to do the job. If the job poses too much risk without a sufficient wage premium, too many workers will leave to find a job elsewhere, and the company will need to either raise pay or reduce risk.

Far too much emphasis is often placed on the phrase “other things being equal (ceteris paribus)” for the theory to apply broadly. In fact, numerous studies have challenged how widespread compensating differentials are for hazardous jobs, demonstrating that selection of data sources and specification of variables lead to widely different results. A competing hypothesis with equal or greater empirical backing holds that outside of certain unionized segments of the economy, hazardous work is compensated at lower levels because of the numerous imperfections of the market. These include segmented job markets and the immobility of lower skilled workers, leading to a situation of noncompeting groups. Lack of knowledge about hazards, power imbalances between management and workers, and the real world in which many people are tied to geographic locations are other barriers to the purely competitive market for labor. The conclusion of Dorman and Hagstrom is that:

Unionized workers may or may not receive hazard pay, but non-unionized workers in dangerous jobs are likely to be paid less than their counterparts in less dangerous jobs – a result far more consistent with limited mobility or segmented labor markets than with the frictionless competitive model that is typically the basis for deducing compensating wage differentials.

A recent radio news report illustrates the limitation of compensating differentials for the essential pandemic worker. The story addressed a nonunion Latino grocery store clerk in a low-wage state who is earning $9.20 per hour and would benefit greatly from a few more dollars an hour, a raise she thinks she deserves particularly as an essential worker unable to avoid exposure to the public. Four months earlier when the unemployment rate was 3 to 4 percent, she might have been able to find a job offer to leverage a raise from her current employer. Today, when pandemic conditions argue strongly for such a raise but tens of millions are newly unemployed, only moral suasion, not market forces, will get her the compensating differential she deserves.

**Strategy and Tactics for Worker Protection in the COVID-19 Crisis**

Medical historian Frank M. Snowden has examined how historical epidemics both shape and reflect societies’ political, social, and economic structures and, in many cases, inequities. The COVID-19 pandemic has laid bare many pernicious aspects of the U.S. economy and society that have been widely noted but not effectively challenged, especially since the great recession that began in 2008. The current workplace health crisis brought on by COVID-19 and the federal government’s wholly inadequate preparation and response was predictable. Market solutions typically touted by both rightwing and neoliberal politicians and think tanks are not up to the task. Healthcare and other essential workers are carrying a tremendous burden for all of us in this crisis. Celebrating them as heroes is an empty gesture unless accompanied by measures to insure that they not be put in this situation again due to government and employer negligence.

The frustration, vulnerability, and anger of frontline essential workers in the COVID-19 pandemic, some in unions and many not, are real and fully justified. The pandemic has exposed conditions that workers themselves have long experienced. We have seen the power and impact of safety and health conditions in organizing drives in many industries but rarely have we seen them so front and center in this many workplaces simultaneously. Indeed, many in the OSH field have been favorably stunned that tens of millions of people now know what PPE stands for. The labor movement, OSH...
activists, and allied forces have both the responsibility and opportunity to engage with these mobilized workers to ensure that something positive emerges from the disgraceful treatment of this workforce.

We are in the middle of an unprecedented situation in our lifetimes, so it may seem a trivial point to protest the terminology of hazard pay while thousands of workers’ lives and health are at risk. However, for the long-term interest and rehabilitation of OSH as a cause and key component of working conditions, it will serve us well to define our terms in this debate. The failure to provide adequate protective measures, from ventilation and other engineering controls down to appropriate PPE, leaves many essential workers in the position of demanding that they at least receive a hazard premium for the conditions under which they work. Far be it from me to argue against such a premium from the comfort of my home office. The media will always call it hazard pay, but we should not. Let’s call it dignity pay, essential pay, or paying true value. Let’s ask why these workers, individually or collectively, should have to beg for a premium to do what the government is calling essential. Why aren’t they already being paid a living wage that values what they do every day, pandemic or not?

It is gratifying that some of our political leaders seem to have recognized this issue and these nuances. The “Essential Worker Bill of Rights” put forth by Senator Elizabeth Warren and Representative Ro Kannah provides a good model for framing the demand for premium pay for essential workers. While even this has been characterized in the media as calling for “hazard pay,” it clearly phrases the concept quite differently in its second demand:

2. Robust premium compensation. Every worker should be paid a livable wage, and essential employees are no exception. During this pandemic, essential workers should also be paid robust premium pay to recognize the critical contribution they are making to our health and our economy. Premium pay should provide meaningful compensation for essential work, be higher for the lowest-wage workers, and not count towards workers’ eligibility for any means-tested programs. It must be retroactive to the start date of the pandemic, and not used to lower the regular rate of pay for any employee.\textsuperscript{23}

Plank 1 of this same document addresses health and safety protections directly. While it may be asking too much for the hierarchy of controls to be named here, a demand for an emergency temporary OSHA standard is included.

Labor and OSH activists must emphasize and impress on legislators the criterion going forward that there is no excuse for failure to implement feasible controls for known hazards like COVID-19 infection. In other words, we need to identify in this crisis the lesson that the OSHA model of state intervention where the market fails—with enforceable standards rather than “shoulds,” “if possibles,” and “encourages employers”—needs to be rejuvenated and defended. And yes, that model needs to be adapted to the realities of the current fissured economy and labor market, in ways that should begin with input from workers themselves who fall through the cracks. In this vein, I am indebted to colleague Michael Dunn of Skidmore College for pointing out that platform or gig workers, such as those working for ride and delivery services, may be subject to a potentially extreme version of hazard pay as their algorithms price in picking up, driving, or delivering customers or goods in highly dangerous environments, whether from criminal or extreme weather events.

What forms this reinvigorated movement for workplace safety and health and worker rights takes remains to be seen. It is instructive that the morally bankrupt corporate Republican political strategy, embodied in Senate leader McConnell, accuses blue state Democrats of attempting to use the COVID-19 crisis to get their “pet” projects into law. Beyond the irony that McConnell is actually doing this himself with his corporate liability exemption, the progressive Democratic positions—livable minimum wage, universal healthcare, paid sick leave, enhanced public health and environmental infrastructure, fair taxation—address the very gaps that COVID-19 has revealed so starkly and would have helped in fighting the pandemic.

Finally, I would be remiss not to reemphasize that the United States has an agency, OSHA, charged with enforcing safety and health regulations and another, the National Institute for Occupational Safety and Health with deep expertise on hazard identification and control. There are many career employees in these agencies that want to and could be assisting much more directly in the COVID-19 response. The refusal of our current government to apply these and similar resources directly in the COVID-19 response. The refusal of our current government to apply these and similar resources while our healthcare and other essential workers risk their lives daily is an appalling abdication of leadership.

Acknowledgments
The author wishes to thank the following persons for comments on earlier versions of this article and/or insights on the topic: M. E. O’Brien, Marcus Widenor, Bob Bussel, Scott Schneider, Mary Miller, Michael Dunn, and Craig Slatin and Darius Sivin of New Solutions.

Declaration of Conflicting Interests
The author(s) declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.
Funding
The author(s) received no financial support for the research, authorship, and/or publication of this article.

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