PEOPLE OVER PROFITS: WHY A PRIVATE RIGHT OF ACTION IN THE OCCUPATIONAL SAFETY AND HEALTH ACT IS NECESSARY DURING THE COVID-19 PANDEMIC

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I. INTRODUCTION

The Occupational Safety and Health Administration ("OSHA") is a government agency tasked with enacting and enforcing standards to safeguard employee health and safety in the workplace.[1] OSHA falls under the United States Department of Labor, and the OSHA Administrator answers to the Secretary of Labor ("Secretary").[2] OSHA was created in 1970 by Congress through the Occupational Safety and Health Act ("the Act").[3]

While the Act provides a blueprint of the requirements that employers must follow to maintain a safe workplace environment for their employees,[4] the Act and OSHA often fall short.[5] OSHA is significantly understaffed and underfunded.[6] Further, due to OSHA's structural failures and because OSHA's mandated fines are much lower than the harm caused by an employer's violation of the Act,[7] OSHA has been referred to as "toothless."[8] These issues have been exacerbated by the COVID-19 pandemic, as OSHA must respond to constant changes in guidance from the Centers for Disease Control and Prevention as well as address the rise and fall of COVID-19

[1] *About OSHA*, U.S. DEP'T LAB., https://www.osha.gov/aboutosha (last visited Feb. 26, 2023).

[2] As of January 2023, the Secretary of Labor is Martin Walsh. *Id.*

[3] *Id.*

[4] *Summary of the Occupational Safety and Health Act: 29 U.S.C. § 651 et seq. (1970)*, U.S. ENV'T PROT. AGENCY (Oct. 4, 2022), https://www.epa.gov/laws-regulations/summary-occupational-safety-and-health-act.

[5] Brooke E. Lierman, *'To Assure Safe and Healthful Working Conditions': Taking Lessons from Labor Unions to Fulfill OSHA's Promises*, 12 LOY. J. PUB. INT. L. 1 (2010).

[6] Grace Panetta, *Enforcing Biden's Workplace Vaccine-or-Test Mandate Falls to a 'Toothless' Federal Agency that Trump Gutted, Experts Say*, INSIDER (Sept. 13, 2021, 4:19 PM), https://www.businessinsider.com/how-underfunded-understaffed-osha-will-enforce-vaccine-mandate-2021-9.

[7] *Id.*

[8] *Id.*

cases.[9] During this health crisis, OSHA's inadequate response has caused its own COVID-19-related regulations to be obsolete, as they lag behind real-time pandemic updates.[10] While some degree of outdatedness can be expected, as the COVID-19 pandemic changes daily, according to an article written in May 2021, OSHA had not updated its COVID-19 recommendations since January 2021, which some consider "eons ago in pandemic terms."[11]

The typical progression for an employee reporting a violation of the Act and a subsequent OSHA action follows multiple steps. First, there must exist an unsafe condition present in the workplace that may result in an injury.[12] The unsafe working condition must violate the Act whether or not an employee is injured.[13] If an employee submits a complaint to OSHA within thirty days of the alleged violation, the Act directs the agency to conduct an inspection so long as the Secretary deems it appropriate.[14] If the agency determines through its investigation that there was a violation of the Act, the agency will hold an informal settlement conference with the employer.[15] If the issue is not resolved through the settlement conference, OSHA will issue a Citation and Notification of Penalty to the employer.[16] OSHA will also impose a fine on the employer for the violation.[17] At that point, the employer shall either pay the fine or appeal the decision by filing a Notice of Intent to Contest; then, the employer may request an informal conference to discuss the violation.[18] Once the Notice of Intent to Contest is filed, the case is officially in litigation.[19]

Alarmingly, at no point during this process does the employee receive sufficient redress for the harm they suffered—or harm they could have suffered—because the Act does not include a private right of action that

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[9] Bruce Rolfsen, *Employers Face Compliance Questions Over CDC Mask Guidance (3)*, BLOOMBERG L. (May 14, 2021, 4:09 PM), https://news.bloomberglaw.com/safety/employers-face-compliance-questions-after-new-cdc-mask-guidance.

[10] *Id.*

[11] *Id.*

[12] "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." Occupational Safety and Health Act, 29 U.S.C. § 654(a)(1).

[13] Southern Hens, Inc. v. Occupational Safety & Health Rev. Comm'n, 930 F.3d 667, 679 No. 18-60436 (5th Cir. 2019).

[14] 29 U.S.C. § 660(c)(2).

[15] OCCUPATIONAL SAFETY & HEALTH ADMIN., EMPLOYER RIGHTS AND RESPONSIBILITIES FOLLOWING A FEDERAL OSHA INSPECTION (2018), https://www.osha.gov/sites/default/files/publications/osha3000.pdf [hereinafter OSHA Employer Rights and Responsibilities].

[16] 29 U.S.C. § 657; *see also* OSHA Employer Rights and Responsibilities .

[17] The amount of the fine is determined by the severity of the violation. 29 U.S.C. §666; *see infra* Section II.

[18] 29 U.S.C. § 659; *see also* OSHA Employer Rights and Responsibilities.

[19] 29 U.S.C. § 659; *see also* OSHA Employer Rights and Responsibilities.

would allow the employee to directly sue their employer for a violation of the Act.[20] For the employee to get adequate relief, the Act must be amended to include a private right of action. A private right of action provides an individual the right to bring a lawsuit in a civil court under a specific statute.[21] In general, a private right of action can be express or implied.[22] An express private right of action is explicitly granted by Congress in the statute at issue.[23] In contrast, an implied right of action is not explicitly stated in the statute, but has been implied through the interpretation of the law by the courts.[24] Providing a private right of action in the Act for employees harmed by their employer's violation of the Act would not only give redress to harmed and potentially injured employees, but would also help alleviate structural issues—such as lack of resources and funding—that detrimentally impact OSHA's effectiveness.

In light of the COVID-19 pandemic, an explicit private right of action is crucial to protect workers.[25] Since OSHA could not sufficiently address the rapid workplace changes during the pandemic, employees have been left to their own devices.[26] As a result, employees are made to suffer the consequences of their employer's violation of regulations in the Act, are adversely affected by the pitfalls of OSHA itself and their inability to effectively address the influx of COVID-19 related violations, and are subject to regulations that inadequately address the concerns of the COVID-19 pandemic.[27]

This Note considers the effect a private right of action under the Act could have on the modern-day workplace during and after the COVID-19 pandemic. Section II of this Note discusses the background of the Act and

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[20] Taylor v. Brighton Corp., 616 F. 2d 256, 258-64 (6th Cir. 1980); *see also Employee Rights Under OSHA,* WOLTERS KLUWER (July 26, 2020), https://www.wolterskluwer.com/en/expert-insights/employees-rights-under-osha.

[21] *See* Gwendolyn McKee, *Injury Without Relief: The Increasing Reluctance of Courts to Allow Negligence Per Se Claims Based on Violations of FDA Regulations*, 83 UMKC L. REV. 161, 164 (2014); *see also* Mariia Synytska, *Private Right of Action*, LAWRINA (Sept. 28, 2021), https://lawrina.com/blog/private-right-of-action/; *see also* Editorial Staff, *Private Right of Action (Definition: All You Need To Know),* INCORPORATED.ZONE (Jan. 15, 2021), https://incorporated.zone/private-right-of-action/ ("You can define a private right of action as the right granted to a private plaintiff to bring legal action against another party based on the Constitution, public statute or federal common law.").

[22] Synytska, *supra* note 21.

[23] *Id.*

[24] *Id.*

[25] "Private rights of action empower citizens to protect *themselves* by allowing plaintiffs to sue a private actor for violating a law meant to protect a plaintiff's rights as defined under a given statute." Andrew Serulneck, *The Importance of a Private Right of Action in a Federal Biometric Privacy Legislation*, 73 RUTGERS U. L. REV. 1593, 1596 (2021) (emphasis in original).

[26] Rolfsen, *supra* note 9.

[27] *Id.*

OSHA, as well as the impact of the COVID-19 pandemic on the workplace. Section III examines the history and implications of the lack of a private right of action while considering the inadequacies of other claims available to employees. Section III also illustrates the need for a private right of action due to the COVID-19 pandemic. Section IV of this Note proposes that, like other already enacted private rights of action, Congress should implement a private right of action stemming from violations of the Act. Section IV also lays out the contours of a private right of action in the Act.

II. BACKGROUND

A. The Occupational Safety and Health Act Generally

The main purpose of the Act is to ensure that all employees are afforded a safe and healthy workplace.[28] In furthering the purpose of the Act, employers[29] and their employees[30] are encouraged:

> [I]n their efforts to reduce the number of occupational safety and health hazards at their places of employment, and to stimulate employers and employees to institute new and to perfect existing programs for providing for safe and healthful working conditions.[31]

Additionally, the Act empowers the Secretary to enact standards to address employee health and safety for all employers that engage in interstate commerce.[32]

The Act includes a general duty clause.[33] The general duty clause requires that each employer:

> (1) 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;

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[28] Occupational Safety and Health Act, 29 U.S.C. § 651(b).

[29] The Act defines "employer" as "a person engaged in a business affecting commerce who has employees, but does not include the United States . . . or any State or political subdivision of a State." 29 U.S.C. § 652(5).

[30] An employee is defined in the Act as "an employee of an employer who is employed in a business of his employer which affects commerce." 29 U.S.C. § 652(6). Specifically, the Act has been interpreted to cover private sector employees with some exceptions. Groups that are exempt from the Act include self-employed workers, immediate members of families who farm and do not employ outside workers, workers covered under federal programs and agencies, and public employees for state and local governments who may be subject to other worker safety laws. *See* OCCUPATIONAL SAFETY & HEALTH ADMIN., WORKERS' RIGHTS 5-7 (2019), https://www.osha.gov/sites/default/files/publications/osha3021.pdf.

[31] 29 U.S.C. § 651(b)(1).

[32] 29 U.S.C. § 651(b)(3).

[33] 29 U.S.C. § 654(a)(1)-(2).

> (2) shall comply with the occupational safety and health standards promulgated under this Act.[34]

Violating employers may have breached the general duty clause or violated one of the specific regulations promulgated under the Act.[35]

There are several levels of violations of the Act,[36] which are laid out in the Occupational Safety and Health Act, 29 U.S.C. § 666. In determining which level of violation applies, OSHA examines the probability of injury resulting from the violation, the severity of the injury, and "the extent to which standard has been violated."[37] The violations are listed in order of severity. First, there are willful violations.[38] An employer who violates the general duty clause willfully or repeatedly may be punished by a fine of no less than $5,000 and no more than $70,000 for each violation.[39] An employer who commits a willful violation that results in the death of an employee may "be punished by a fine of not more than $10,000 or by imprisonment for not more than six months, or by both."[40] According to a January 2023 Press Release, an Alabama company pleaded guilty to willful violations of workplace safety standards that resulted in the death of an employee.[41] Because the company pleaded guilty, it must pay $167,928 for penalties and participate in a compliance and auditing program.[42] The company previously paid over $155,000 in penalties in 2018 after a different OSHA investigation.[43]

Serious violations are less severe than willful violations.[44] Serious violations exist when "there is a substantial probability that death or serious physical harm could result" from a condition or practice.[45] An employer who

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[34] *Id.*

[35] *See* 29 U.S.C. § 654.

[36] OSHA's interpretation of these violations can be found at OSHA Employer Rights and Responsibilities at 5.

[37] Baltz Bros. Packing Co. 2 OSAHRC 384, 387 (No. 91, 1973).

[38] Willful violations have been interpreted by OSHA to mean "when an employer has demonstrated either an intentional disregard for the requirements of the OSH Act or plain indifference to employee safety and health." OSHA's interpretation of these violations can be found at OSHA Employer Rights and Responsibilities at 5.

[39] 29 U.S.C. § 666(a).

[40] 29 U.S.C. § 666(e).

[41] *In Federal Court, Alabama Plastics Manufacturer Pleads Guilty to Willful Safety Regulation Violation Found in 2017 OSHA Investigation into Worker's Death*, U.S. DEP'T LAB., OCCUPATIONAL SAFETY & HEALTH ADMIN. (Jan. 24, 2023), https://www.osha.gov/news/newsreleases/region4/01242023.

[42] *Id.*

[43] *Id.*

[44] 29 U.S.C. § 666(k).

[45] *Id.*

receives a citation for a serious violation of the Act "shall be assessed a civil penalty of up to $7,000 for each such violation."[46]

In addition to willful and serious violations, some violations are "specifically determined not to be of a serious nature."[47] These violations may also be "assessed a civil penalty of up to $7,000 for each violation."[48] For example, OSHA assigned penalties for repeat, serious, and other-than-serious violations to the United States Postal Service for several unsafe conditions.[49] These conditions included a missing guard or cover to an electric motor, exposed flexible cords and overloaded circuits, untrained employees operating an industrial truck, lack of seatbelts on employees who operated the forklifts, forklifts without proper lights and backup alarms, and the presence of raw sewage in work areas.[50] The penalties amounted to over $350,000.[51]

Additionally, an employer may be penalized for failing "to correct a violation for which a citation has been issued under section 9(a) within the period permitted for its correction."[52] If an employer commits this violation, they "may be assessed a civil penalty of not more than $7,000 for each day during which such failure or violation continues."[53] Finally, "any employer who violates any of the posting requirements, as prescribed under the provisions of this Act, shall be assessed a civil penalty of up to $7,000 for each violation."[54]

i. Procedures for Complaints Regarding Safety Violations versus Complaints Regarding Retaliation

1. Safety and Health Violation Claims

There are different ways employers may be found to have violated the Act.[55] These include: (1) OSHA inspectors finding the employer committed a violation through an independent investigation; (2) an investigation resulting from the complaint of an employee; or (3) state or federal officials

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[46] 29 U.S.C. § 666(b).

[47] 29 U.S.C. § 666(c).

[48] *Id.*

[49] *Department of Labor Cites US Postal Service with 16 Violations for Endangering Workers at Three Tennessee Facilities, Proposes $350K in Penalties*, U.S. DEP'T LAB., OCCUPATIONAL SAFETY & HEALTH ADMIN. (Jan. 25, 2023), https://www.osha.gov/news/newsreleases/region4/01252023.

[50] *Id.*

[51] *Id.*

[52] 29 U.S.C. § 666(d).

[53] *Id.*

[54] 29 U.S.C. § 666(i).

[55] *See* 29 U.S.C. §§ 657(f), 659.

bringing an action against the company.[56] Employees and their representatives have the right to request an inspection if they believe a violation may cause physical harm or imminent danger.[57] These complaints can be filed anonymously.[58] Additionally, a worker does not need to know that there has been a violation of a specific Act standard to file a complaint.[59] Before an inspection of the workplace occurs, the Secretary must determine, through the information provided from the complaint, that it would be reasonable to believe a violation or danger to employee health and safety is present.[60] If the Secretary finds that there is no reasonable belief that a violation of the Act occurred, he will notify the employees of the finding in writing. [61]

2. Whistleblowing and Retaliation Claims

The Occupational Safety and Health Act also prohibits employers from discriminating against or wrongfully terminating employees who file complaints with OSHA.[62] Under the Act, employees are protected from retaliation for reporting conduct that the employee believes is unlawful "as long as the employee had a reasonable, good faith belief that a violation could occur."[63] An employer is also prohibited from retaliating against an employee participating in an Act violation proceeding.[64] Act violation proceedings include injunction proceedings[65] or any hearings regarding OSHA findings.[66]

The four factors that OSHA considers when determining whether there was a retaliatory act against a whistleblower[67] are: (1) whether the employee participated in an activity that is protected under OSHA's whistleblower laws;[68] (2) whether the employer had knowledge of or suspected the protected activity;[69] (3) whether the employer took an adverse employment

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[56] *Id*.

[57] 29 U.S.C. § 657(f)(1).

[58] 29 U.S.C. § 657(f)(1); *see also OSHA Frequently Asked Questions,* OCCUPATIONAL SAFETY & HEALTH ADMIN., https://www.osha.gov/faq#v-nav-infoworkers (last visited Feb. 28, 2023).

[59] *OSHA Frequently Asked Questions*, *supra* note 58.

[60] 29 U.S.C. § 657(f)(1); *see also Federal OSHA Complaint Handling Process*, OCCUPATIONAL SAFETY & HEALTH ADMIN., https://www.osha.gov/workers/handling (last visited Feb. 28, 2023).

[61] 29 U.S.C. § 657(f)(1).

[62] 29 U.S.C. § 660(c)(1).

[63] *Frequently Asked Questions (FAQs*), OCCUPATIONAL SAFETY & HEALTH ADMIN., https://www.whistleblowers.gov/faq (last visited Feb. 28, 2022).

[64] 29 U.S.C. § 660(c)(1).

[65] 29 U.S.C. § 662.

[66] 29 U.S.C. § 659.

[67] *Frequently Asked Questions (FAQs*), *supra* note 63.

[68] *Id.*

[69] *Id.*

action,[70] such as firing the employee, intimidating the employee, or demoting the reporting employee; and (4) whether the protected activity caused the adverse action.[71]

If discrimination against or wrongful termination of a reporting employee occurs, the employee may file a complaint with the Secretary within thirty days.[72] According to OSHA, whistleblower complaints cannot be filed anonymously.[73] Following the filing of a complaint, the Secretary must determine if an investigation is appropriate.[74] If an investigation shows that the employer violated specific sections of the Act, the Secretary may bring an action in the appropriate United States District Court.[75]

3. State Law versus Federal Preemption in a Retaliation Context

Some states allow for a common law private right of action against employers who retaliate against whistleblowing employees; there, the plaintiff must refute a defense that the Act preempts a state law private right of action.[76] While it was the intent of the drafters of the Act that, in lieu of a private right of action, employees would take advantage of workers' compensation laws,[77] this is difficult in practice.[78] Since there is no federal private right of action for retaliation claims, such claims are only heard in state courts where it is difficult to pursue a remedy that makes the employee whole.

The Eighth Circuit court addressed this issue in Schweiss v. Chrysler Motors Corp.[79] Here, the plaintiff complained about the defendant's various alleged violations of the Act to OSHA and was fired shortly after filing the complaints.[80] In Missouri, retaliation is an actionable tort.[81] However, the defendant company claimed that the plaintiff's wrongful discharge claim was

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[70] *Id.*

[71] *Id.*

[72] Occupational Safety and Health Act, 29 U.S.C. § 660(c)(2).

[73] *Frequently Asked Questions (FAQs)*, *supra* note 63.

[74] 29 U.S.C. § 660(c)(2).

[75] *Id.*

[76] Jarod S. Gonzalez, *A Pot of Gold at the End of the Rainbow: An Economic Incentives-Based Approach to OSHA Whistleblowing*, 14 EMP. RTS. & EMP. POL'Y J. 325 (2010); *see also* Schweiss v. Chrysler Motors Corp., 922 F.2d 473 (8th Cir. 1990); *see also* Flenker v. Willamette Indus., Inc., 967 P.2d 295 (Kan. 1998).

[77] *See infra* Section III for further discussion of the inadequacies of state workers' compensation laws.

[78] "[The] court held that the congressional intent to have retaliatory discharge complaints administratively screened before proceeding to federal court would be frustrated by allowing state wrongful discharge actions…there is no evidence that 'employees will forgo their statutory options and rely solely on state remedies for retaliation.'" *Schweiss*, 922 F.2d at 475.

[79] *Id.* at 473.

[80] *Id.*

[81] *Id.*

preempted by Occupational Safety and Health Act, 29 U.S.C. § 660(c).[82] The district court agreed with the defendant, holding that the action was preempted because there was a congressional intent "to have retaliatory discharge complaints administratively screened before proceeding in federal court" and that this intent "would be frustrated by allowing state wrongful decision actions."[83] Additionally, the district court found that the "goal of involving the Secretary [of Labor] in the resultant lawsuit would be impeded."[84] Ultimately, the Eighth Circuit reversed the district court's holding, finding that the district court's reasoning was "too speculative" because there was no evidence that workers would only rely on state remedies in retaliation actions.[85] Thus, the plaintiff's claims were not preempted by the Act.

Similarly, in Flenker v. Williamette Indus. Inc., the Kansas Supreme Court examined whether the Act preempted state retaliation claims.[86] The plaintiff employee alleged that he was terminated for reporting unsafe working conditions to OSHA.[87] Relying on Schweiss, the court held that the Act "[did] not provide an adequate alternative remedy" and did not preempt state claims.[88] As such, the plaintiff could file a claim under state law for wrongful discharge.[89]

B. COVID-19, the Workplace, and OSHA's Inadequacies

Since the beginning of the COVID-19 pandemic in the United States in March 2020, COVID-19 has had a significant impact on the daily lives of Americans[90] and has changed the American workplace in several ways. For example, it has made discussions about workplace safety and health standards more visible and accessible to employees and the public.[91] The pandemic also changed the face of the workplace because it forced millions

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[82] *Id.* at 474; *see also* Occupational Safety and Health Act, 29 U.S.C. § 660(c) (provides protections for whistleblower employees.).

[83] *Schweiss*, 922 F.2d at 475.

[84] *Id.*

[85] *Id.* at 475-76.

[86] Flenker v. Willamette Indus., Inc., 967 P.2d 295 (Kan. 1998).

[87] *Id.* at 297.

[88] *Id.* at 302.

[89] *Id.*

[90] Patrick Van Kessel, Chris Baronavski, Alissa Scheller, & Aaron Smith, *In Their Own Words, Americans Describe the Struggles and Silver Linings of the COVID-19 Pandemic*, PEW RSCH. CTR. (Mar. 5, 2021), https://www.pewresearch.org/2021/03/05/in-their-own-words-americans-describe-the-struggles-and-silver-linings-of-the-covid-19-pandemic/.

[91] Katherine J. Igoe, *How COVID-19 Has Changed the Standards of Worker Safety and Health–and How Organizations Can Adapt*, HARVARD T.H. CHAN SCH. PUB. HEALTH (Mar. 31, 2021), https://www.hsph.harvard.edu/ecpe/how-covid-19-changed-worker-safety-and-health/.

of Americans to shift to remote work.[92] Further, mask mandates, vaccine mandates, mandatory symptom reporting, and return to workplace policies became commonplace during the COVID-19 pandemic to address the impact of COVID-19 and its variants—mutations of the COVID-19 virus that may be more transmissible—[93]on the workplace.[94] In December 2021, the Omicron variant[95] impacted return to workplace dates, and responses to the variant built upon the structures in place from the surge of the Delta variant.[96] These measures included vaccination requirements and regular testing for employees.[97] As a result of the changes that arose because of the pandemic, employers have been forced to act quickly to acclimate their business practices and implement new strategies.[98]

The consistent dialogue surrounding the COVID-19 pandemic revolves around reaching a "post-pandemic" period.[99] The World Health Organization provides just one example of what a "post-pandemic" period is, defining "post-pandemic" as a time where "levels of influenza activity have returned to the levels seen for seasonal influenza in most countries with adequate surveillance."[100] As society shifts into a "post-pandemic" world, the question remains whether the United States is truly "post-pandemic"? The influx of the Delta and Omicron variants as well as the threat of other variants, show that the world is still in the midst of the COVID-19 pandemic.

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[92] Kim Parker, Juliana Menasce Horowitz, & Rachel Minkin, *How the Coronavirus Outbreak Has–and Hasn't–Changed the Way Americans Work*, PEW RSCH. CTR. (Dec. 9, 2020), https://www.pewresearch.org/social-trends/2020/12/09/how-the-coronavirus-outbreak-has-and-hasnt-changed-the-way-americans-work/.

[93] *Variants of the Virus,* CTR. FOR DISEASE CONTROL & PREVENTION (Feb. 6, 2023), https://www.cdc.gov/coronavirus/2019-ncov/variants/about-variants.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fvariants%2Fvariant.html.

[94] Jennifer Liu, *How the Omicron Variant Could Impact Return-to-Office Plans: 'We're Dealing with Rapidly Moving Facts'*, CNBC (Dec. 1, 2021, 4:01 PM), https://www.cnbc.com/2021/12/01/how-covid-19-omicron-variant-could-impact-return-to-office-plans.html.

[95] The Omicron variant is a different lineage of COVID-19 that spreads more easily than other variants, including the Delta variant. The Omicron variant caused less severe illness and fewer deaths, and vaccines were effective in preventing Omicron infections and severe symptoms. *Variants of the Virus, supra* note 93.

[96] The Delta variant had an exponential growth rate compared to the initial strand of COVID-19 and was fifty percent more contagious that the original COVID-19 lineage. Kathy Katella, *5 Things To Know About the Delta Variant*, YALE MED. (Mar. 1, 2022), https://www.yalemedicine.org/news/5-things-to-know-delta-variant-covid; Liu, *supra* note 94.

[97] Liu, *supra* note 94.

[98] Igoe, *supra* note 91.

[99] Alvin Powell, *What Will the New Post-Pandemic Normal Look Like?,* HARV. GAZETTE (Nov. 24, 2020), https://news.harvard.edu/gazette/story/2020/11/our-post-pandemic-world-and-whats-likely-to-hang-round/.

[100] WORLD HEALTH ORG., PANDEMIC INFLUENZA PREPAREDNESS AND RESPONSE: A WHO GUIDANCE DOCUMENT 11 (2009), https://www.ncbi.nlm.nih.gov/books/NBK143062/pdf/Bookshelf_NBK143062.pdf.

Since, as of 2023, society is not quite yet "post-pandemic" it is crucial to address shortcomings in approaching the COVID-19 pandemic now, as future pandemics or health crises will likely occur.[101] Congress must amend the Act to include a private right of action, and OSHA must enact and enforce standards that address infectious disease in the workplace. Without these policies to respond to impending health crises, employees will be susceptible to adverse health outcomes and exploited by employers.

The COVID-19 pandemic has highlighted how OSHA falls short in its duty to hold employers accountable for putting their employees at risk. Due to its lack of resources, OSHA regulators either never inspected, or took months to inspect, dozens of employers and workplaces where employees had submitted complaints that their employers were not following COVID-19 safety precautions.[102] A significant issue is that OSHA lacks the necessary staff to respond to the complaints arising from this health crisis.[103] According to data from 2019, the Trump Administration reduced the number of OSHA inspectors to "the lowest level since the early 1970s."[104] In September 2021, there were approximately 1,798 federal and state OSHA inspectors, meaning there was one inspector per 82,881 workers with just under four dollars budgeted per worker.[105] In 1992, there was one inspector per 54,952 workers.[106]

The workplace has been considered a "primary source of COVID-19 outbreaks, with thousands of workers and infected dying,"[107] and OSHA is clearly not equipped to handle the influx of COVID-19-related complaints.[108] An audit report issued by the Office of the Inspector General for the Department of Labor stated that "the pandemic has significantly increased the number of whistleblower complaints OSHA has received, and at the same

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[101] Michael Penn, *Statistics Say Large Pandemics Are More Likely Than We Thought*, DUKE GLOB. HEALTH INST. (Aug. 23, 2021), https://globalhealth.duke.edu/news/statistics-say-large-pandemics-are-more-likely-we-thought.

[102] David Shepardson, *Biden Vaccine Mandate Will Test OSHA, U.S. Workplace Regulator*, REUTERS (Sep. 13, 2021, 11:19 AM), https://www.reuters.com/legal/government/biden-vaccine-mandate-will-test-us-workplace-regulator-2021-09-13/.

[103] Panetta, *supra* note 6.

[104] Shepardson, *supra* note 102; *Id.*

[105] Panetta, *supra* note 6.

[106] *Death on the Job: The Toll of Neglect, 2021*, AM. FED'N LAB. & CONG. INDUS. ORGS. (May 4, 2021), https://aflcio.org/reports/death-job-toll-neglect-2021.

[107] *Id.*

[108] U.S. DEP'T LAB., OFF. INSPECTOR GEN. – OFF. AUDIT, COVID-19: OSHA NEEDS TO IMPROVE ITS HANDLING OF WHISTLEBLOWER COMPLAINTS DURING THE PANDEMIC (Aug. 14, 2020), https://www.oversight.gov/sites/default/files/oig-reports/19-20-010-10-105_OSHA_WB_COVID-19_Final%20Rpt_081420.pdf; *see also* Lori Lange, *OSHA Received Increased Number of Whistleblower Complaints During the First Four Months of the Covid-19 Pandemic*, PECKAR & ABRAMSON, P.C. (Aug. 24, 2020), https://www.pecklaw.com/osha-received-increased-number-of-whistleblower-complaints-during-the-first-four-months-of-the-covid-19-pandemic/.

time, the Whistleblower Program's full-time equivalent employment ("FTE") has decreased."[109] In addition, the report stated that OSHA was not investigating these complaints in a timely matter and that "the potential exists for an even greater delay in the average days to close an investigation" as a result of OSHA's lack of resources.[110] OSHA is failing to adequately address major health concerns, like the COVID-19 pandemic, that impact employee safety and health at an exponential rate. Clearly, a private right of action in the Act is necessary to better address infectious diseases in the workplace and protect employees.

III. ANALYSIS

A. The Lack of a Private Right of Action Explicitly or Implicitly in the Act

i. Condensed History of the Supreme Court and an Implicit Private Right of Action

The Supreme Court has held that an implicit private right of action may exist in some statutes under the maxim of ubi jus ibi remedium, meaning that when a statute "'prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him.'"[111] The Supreme Court has never determined that there is an implicit right of action for employees under the Act, nor has the Court addressed the question of whether there is an implicit right of action within the Act.[112] However, the Court has found implicit rights of action in similar laws in the past.[113]

In Texas & P.R. Co. v. Rigsby,[114] the Supreme Court examined whether there was a private right of action under the Federal Safety Appliance Acts.[115] The plaintiff employee in Rigsby was injured at the workplace due to a defective piece of equipment.[116] The Federal Safety Appliance Acts,[117] required that certain pieces, including "secure grab-irons or handholds,"[118] be installed to assure the safety of workers like the plaintiff. The Court stated,

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[109] U.S. DEP'T LAB., OFF. INSPECTOR GEN. – OFF. AUDIT, *supra* note 108, at 2.

[110] *Id.* at 6.

[111] Texas & Pac. Ry. Co. v. Rigsby, 241 U.S. 33, 39 (1916) (quoting Holt, C.J., *Anon*., 6 Mod. 26, 27).

[112] Taylor v. Brighton Corp., 616 F.2d 256 (6th Cir. 1980).

[113] The Supreme Court has found that there is an implicit right of action in the Federal Safety Appliance Acts in *Texas & Pac. Ry. Co.*, 241 U.S. at 39.

[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] Federal Safety Appliance Acts, 45 U.S.C. §§ 11-16 (1910).

[118] *Texas & Pac. Ry. Co.*, 241 U.S. at 37; Federal Safety Appliance Acts, 45 U.S.C. § 4.

> [None] of the Acts, indeed, contains express language conferring a private right of action for the death or injury of an employee; but the safety of employees and travelers is their principal object, and the right of action by an injured employee, even without the Employers' Liability Act, has never been doubted.[119]

Ultimately, as described by the Court, there must be "a liability in [the plaintiff's] favor" to obtain relief within the statute because the plaintiff's injury "was directly attributable to a defect in an appliance which by the 1910 amendment was required to be secure."[120] The Federal Safety Appliance Acts[121] were similar to the Act because both set out with the same objective: requiring employers to take steps to ensure the safety of their employees.[122]

In Cort v. Ash,[123] the Supreme Court examined whether a private right of action existed under the Labor-Management Relations Act of 1947,[124] which prohibited corporations from making contributions to presidential elections.[125] The Supreme Court enumerated several factors a court should use in determining whether a private remedy is implicit in a statute.[126] The first factor considers whether the statute bestows a benefit or federal right to the plaintiff.[127] Next, the second factor asks whether there is explicit or implicit legislative intent to create or deny the plaintiff a private right of action.[128] The third factor assesses whether allowing the plaintiff a private right of action is "consistent with underlying purposes of the legislative scheme."[129] The final factor examines if a private right of action is traditionally a matter of state law and if it would be "inappropriate to infer a cause of action based solely on federal law."[130] The Court used these factors

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[119] *Texas & Pac. Ry. Co.*, 241 U.S. at 39.

[120] *Id.* at 40.

[121] Similar requirements to the (now repealed) Federal Safety Appliance Acts, are found under 49 U.S.C. §§ 20101-20121. 49 U.S.C. § 20103 states that the Secretary of Transportation may "prescribe regulations and issue orders for every area of railroad safety supplementing laws and regulations." This parallels the function of the Secretary of Labor in the Act. According to 49 U.S.C. § 20111(a)(1)-(3), the Secretary of Transportation has the "exclusive authority to impose and compromise a civil penalty for a violation of a railroad safety regulation . . . request an injunction for a violation of a railroad safety regulation . . . and to recommend appropriate action be taken."

[122] See *Texas & Pac. Ry. Co.*, 241 U.S. at 39, for the purpose of the Federal Safety Appliance Acts. See 29 U.S.C. § 651(b), for the purpose of the Occupational Safety and Health Act.

[123] Cort v. Ash, 422 U.S. 66 (1975).

[124] Labor-Management Relations Act of 1947, 18 U.S.C. § 610.

[125] *Id.*; *Cort*, 422 U.S. at 66.

[126] *Cort*, 422 U.S. at 78.

[127] *Id.*

[128] *Id.*

[129] *Id.*

[130] *Id.*

in Cort to conclude there was no implicit right of action within the statute in question.[131]

The factors defined in Cort v. Ash provided an outline that has been used in subsequent lower court cases considering whether there is an implicit right of action in the Act.[132] In Taylor v. Brighton Corp.,[133] the Sixth Circuit addressed whether the Occupational Safety and Health Act of 1970[134] contained an implicit private right of action for claims of retaliation against an employee for reporting safety violations.[135] Section 11(c) of the Act outlines the procedure for an employee to submit a complaint to the Secretary for discharge or discrimination relating to the Act and provides the process the Secretary must follow to address the violation.[136] First, if an employee believes that they were discharged or discriminated against by their employer in violation of the whistleblower protections of the Act, they must submit a complaint to the Secretary within thirty days of the alleged violation.[137] Then, the Secretary must determine if an investigation is appropriate.[138] The Secretary has ninety days from the receipt of the complaint to notify the complainant of his or her determination of whether the investigation of the violation is appropriate.[139] If the investigation shows a violation, the Secretary shall bring an action against the employer in the United States District Court with jurisdiction over the parties.[140]

The plaintiffs in Taylor alleged that they were wrongfully terminated after reporting workplace safety violations to OSHA.[141] The plaintiffs submitted their complaint to the Secretary on June 27, 1975, and were notified in October 1976 that the Secretary would not be filing a suit over their allegations.[142] In 1977, the plaintiffs filed suit in the Southern District of Ohio alleging a violation of section 11(c) of the Act.[143] The Secretary filed an amicus brief in the case urging the court to find an implied right of action within the Act.[144] The Secretary believed that, due to a lack of resources, he

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[131] *Id.* at 68-69.

[132] *See* Taylor v. Brighton Corp., 616 F.2d 256 (6th Cir. 1980); *see also* Johnson v. Interstate Mgmt. Co., 849 F.3d 1093 (D.C. Cir. 2017); *see also id.*

[133] *Taylor,* 616 F.2d at 256.

[134] Occupational Safety and Health Act of 1970 § 11(c); Occupational Safety and Health Act, 29 U.S.C. § 660(c)(1)-(2).

[135] *Taylor,* 616 F.2d at 257.

[136] 29 U.S.C. § 660(c).

[137] 29 U.S.C. § 660(c)(2).

[138] *Id.*

[139] 29 U.S.C. § 660(c)(3).

[140] 29 U.S.C. § 660(c)(2).

[141] *Taylor,* 616 F.2d at 257.

[142] *Id.*

[143] *Id.*; Occupational Safety and Health Act of 1970 § 11(c); 29 U.S.C. § 660(c)(1).

[144] *Taylor,* 616 F.2d at 263.

was inadequately addressing employees' complaints and, thus, "individual suits offer the only realistic hope of protecting employees from retaliatory discrimination."[145] The court rejected this argument, reasoning that an explicit private right of action must come directly from Congress.[146] The Taylor court found that a private right of action was inconsistent with the enforcement plan made by Congress, and the factors established in Cort were not satisfied.[147]

The plaintiff argued that there was an implicit private right of action in Section 11(c) of the Act[148] because when drafting the Act, Congress had the intent to provide remedy to employees who experience retaliatory discrimination.[149] The Sixth Circuit disagreed with this argument, citing the Supreme Court decision Touche Ross & Co. v. Redington.[150] In Touche Ross & Co.,[151] the Court had addressed the question of whether the Securities Exchange Act of 1934 § 17(a) provided a private remedy.[152] The Court stated that providing a private right of action is solely the decision of Congress and that, if Congress had intended there to be a private right of action in the Act, it would have included it in the statute.[153]

The court in Johnson v. Interstate Management Company, LLC[154] echoed the idea that Congress must initiate federal causes of action.[155] Like the court in Taylor, here, the D.C. Circuit again examined whether a private right of action existed for a Section 11(c)[156] retaliation claim.[157] The D.C. Circuit Court reasoned that the Supreme Court in Cort showed "hostility to implied causes of action" because "[to] recognize an implied cause of action, we have to conclude that Congress intended to provide a cause of action even though Congress did not expressly say as much . . . that is a hard bar to clear."[158] The court found that there was not an implied right of action since

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[145] *Id.*

[146] *Id.*

[147] *Id.* Other courts have reached a similar conclusion for cases involving a private right of action for retaliation claims under the Act. *See* Schweiss v. Chrysler Motors Corp., 922 F.2d 473 (8th Cir. 1990); *see also* Flenker v. Willamette Indus., Inc., 967 P.2d 295 (Kan. 1998).

[148] Occupational Safety and Health Act of 1970 § 11(c); 29 U.S.C. § 660(c)(1).

[149] *Taylor,* 616 F.2d at 263.

[150] *Id.* at 264; Touche Ross & Co. v. Redington, 442 U.S. 560 (1979).

[151] *Touche Ross & Co*., 442 U.S. at 560.

[152] *Id.* at 562; *Taylor,* 616 F.2d at 263.

[153] *Taylor,* 616 F.2d at 263 (quoting *Touche Ross & Co.*, 442 U.S. at 579).

[154] Johnson v. Interstate Mgmt. Co., 849 F.3d 1093 (D.C. Cir. 2017).

[155] *Id.*

[156] Occupational Safety and Health Act of 1970 § 11(c); 29 U.S.C. § 660(c).

[157] *Johnson*, 849 F.3d at 1093.

[158] *Id.* at 1097-98.

the statute explicitly gave the Secretary the right to sue, but did not afford such a right to private parties, like employees.[159]

The courts in these decisions are correct: it is up to Congress to include a private right of action in statutes.[160] "Often the very act of whistleblowing indicates that governmental regulation has been inadequate to protect the public; it represents a breakdown of systems whose very goal is to make sure that misconduct does not occur in the first place."[161] As such, this Note proposes that the Act must be amended to include an explicit private right of action for employees harmed by their employer's violation of the Act through retaliation.

B. Problems With the Administrative Process

As this Note previously states, OSHA is underfunded and understaffed, which is a massive logistical hinderance to the agency's required administrative process.[162] These inadequacies perpetuate a cycle in which employees who have been harmed by their employer's inability to adhere to the Act's standards are left without an adequate remedy because employers lack the incentive to provide safe workplaces without administrative oversight.[163] When OSHA oversees hundreds of thousands of employers with only a fraction of inspectors and investigators, its process is ineffective and cannot properly address the complaints of employees who have been hurt or endangered by their employer's violations of the Act. These structural failures of OSHA have been exacerbated by the COVID-19 pandemic,[164] which had its own detrimental impact on government processes, causing delays affecting the operations of various government agencies.[165]

A significant challenge that OSHA faces is responding to more complaints to guarantee worker safety and protection for reporting concerns with minimal resources.[166] Accordingly, employees who submit complaints to OSHA regarding their employers' alleged violations of the Act are not

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[159] *Id.* at 1098.

[160] *See id.* at 1093; Taylor v. Brighton Corp., 616 F.2d 256 (6th Cir. 1980); Touche Ross & Co. v. Redington, 442 U.S. 560 (1979).

[161] Monique C. Lillard, *Exploring Paths to Recovery for OSHA Whistleblowers: Section 11(C) of the OSH Act and the Public Policy Tort*, 6 EMP. RTS. & EMP. POL'Y J. 329 (2002) (quoting Winters v. Houston Chronicle Pub. Co., 795 S.W.2d 723, 728 (Sup. Ct. Tex. 1990)).

[162] Shepardson, *supra* note 102; Panetta, *supra* note 6.

[163] Shepardson, *supra* note 102.

[164] *Id.*; Panetta, *supra* note 6.

[165] PANDEMIC RESPONSE ACCOUNTABILITY COMM., TOP CHALLENGES FACING FEDERAL AGENCIES: COVID-19 EMERGENCY RELIEF AND RESPONSE EFFORTS (June 2020), https://www.oversight.gov/sites/default/files/oig-reports/Top%20Challenges%20Facing%20Federal%20Agencies%20-%20COVID-19%20Emergency%20Relief%20and%20Response%20Efforts1.pdf.

[166] *Id*.

likely to receive any redress through administrative channels.[167] Part of OSHA's funding problem is that the fines that OSHA collects from employers in violation of the Act do not fund further Act enforcement or OSHA investigations.[168] Rather, the fines collected are sent directly to the United States Treasury.[169]

Additionally, the Act does not provide a way to address infectious diseases that impact the workplace.[170] However, while the Act does not include explicit regulations specifically addressing infectious diseases spread within the workplace, several regulations can apply to the COVID-19 pandemic.[171] These regulations include providing personal protective equipment for employees and ensuring employees receive proper training on using this equipment.[172] In addition, an argument exists that, under the general duty clause of the Act, an employer must protect against the spread of infectious disease because of the duty to have a workplace that is "free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."[173]

C. Profits Over People During the COVID-19 Pandemic

The term "profits over people" refers to the idea that a company prioritizes its profitability over the safety and welfare of its employees.[174] This concept is not foreign to OSHA and enforcement of the Act.[175] In 2015, OSHA found that Ashley Furniture Industries Incorporated ("Ashley Furniture") had violated the Act forty-eight times, and out of a workforce of 4,500 employees, there were over 1,000 work-related injuries.[176] Ashley Furniture blamed the employees for their injuries, despite the fact that they

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[167] Shepardson, *supra* note 102; Panetta, *supra* note 6.

[168] *See Penalty Payment*, U.S. DEP'T LAB. OCCUPATIONAL SAFETY & HEALTH ADMIN., https://www.osha.gov/penalties/payments (last visited Mar. 1, 2023).

[169] Occupational Safety and Health Act, 29 U.S.C. § 666(l); *see also id.*

[170] *See* 29 U.S.C. §§ 651 et seq.

[171] Kelly K. Dineen, *Meat Processing Workers and the Covid-19 Pandemic: The Subrogation of People, Public Health, and Ethics to Profits and a Path Forward*, 14 ST. LOUIS. U. J. HEALTH L. & POL'Y 7 (2020).

[172] 29 C.F.R. § 1910.132(d) (2017); *see also id*.

[173] 29 U.S.C. § 654(a)(1).

[174] James R. Otteson, *Democracy and People over Profit*, 18 GEO. J. L. & PUB. POL'Y 871, 877 (2020).

[175] *Ashley Furniture faces $1.76M in Fines After OSHA Finds More Than 1,000 Worker Injuries at Wisconsin Site in Past 36 Months*, U.S. DEP'T LAB. OCCUPATIONAL SAFETY & HEALTH ADMIN. (Feb. 2, 2015), https://www.osha.gov/news/newsreleases/region5/02022015; *Profit Over People: Alarming Trend Continues at Dollar General Stores Where Seven Southeast Inspections Again Find Willful Violations*, U.S. DEP'T LAB. OCCUPATIONAL SAFETY & HEALTH ADMIN. (Nov. 1, 2022), https://www.osha.gov/news/newsreleases/region4/11012022.

[176] *Ashley Furniture faces $1.76M in Fines After OSHA Finds More Than 1,000 Worker Injuries at Wisconsin Site in Past 36 Months*, *supra* note 175.

were caused due to violations of the Act and unsafe conditions.[177] Former Secretary of Labor Thomas E. Perez stated that Ashley Furniture perpetuated a cycle of putting profits over the safety of its employees and "employees are paying the price . . . Safety and profits are not an 'either, or' proposition. Successful companies across this nation have both."[178]

More recently, in 2022, Dollar General Corporation ("Dollar General") has been repeatedly cited for willful, repeat, and serious workplace violations.[179] These violations included a lack of required handrails on stairs, keeping electrical cabinets open—thereby putting employees at risk of electrocution, and storing items in front of electrical cabinets—creating a fire hazard.[180] In a press release, Assistant Secretary for Occupational Safety and Health Doug Parker stated that Dollar General demonstrated a "pattern of alarmingly willful disregard for federal safety standards, choosing to place profits over their employee[s]."[181]

In January 2023, OSHA issued new guidance[182] "to make its penalties more effective in stopping employers from repeatedly exposing workers to life-threatening hazards or failing to comply with certain workplace" standards.[183] The Assistant Secretary for Occupational Safety and Health stated that this new guidance was crafted to address employers who choose profits over their employees.[184]

i. Amazon Investigation

In March 2020, New York Attorney General Letitia James opened an investigation into Amazon following employee complaints that the company was failing to take proper safety precautions against COVID-19.[185] Amazon is one of the largest corporations in the world and has significantly profited,

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[177] *Id.*

[178] *Id.*

[179] *Profit Over People: Alarming Trend Continues at Dollar General Stores Where Seven Southeast Inspections Again Find Willful Violations*, *supra* note 175.

[180] *Id.*

[181] *Id.*

[182] The new guidance is set to be effective sixty days after January 26th, 2023. *Department of Labor announces enforcement guidance changes to save lives, target employers who put profit over safety*, U.S. DEP'T LAB. OCCUPATIONAL SAFETY & HEALTH ADMIN. (Jan. 26, 2023), https://www.osha.gov/news/newsreleases/national/01262023-0.

[183] *Id.*

[184] *Id.*

[185] *Attorney General James Files Lawsuit Against Amazon for Failing to Protect Workers During COVID-19 Pandemic*, LETITIA JAMES N.Y. STATE ATT'Y GEN. (Feb. 17, 2021), https://ag.ny.gov/press-release/2021/attorney-general-james-files-lawsuit-against-amazon-failing-protect-workers.

and continues to profit, from the COVID-19 pandemic.[186] During the pandemic, there was a "rush to online shopping," which fueled Amazon's profits.[187] In 2021, Amazon had a net income increase of approximately $33.4 billion.[188] In amassing these profits during the COVID-19 crisis, Amazon allegedly exploited its workers, as indicated by the lawsuit initiated by Attorney General James.[189] Notably, this alleged exploitation followed historic patterns of employment discrimination against minority workers, as most of Amazon's lowest-paid positions are filled by people of color, with white employees tending to fill higher-paying positions.[190] According to data from 2019 and 2020, of the 400,000 lowest-paid Amazon employees, over sixty percent were Black or Hispanic, and women made up over half of these employees.[191]

In February 2021, Attorney General James filed a lawsuit in the state Supreme Court of New York County against Amazon for the company's alleged failures to "provide adequate health and safety measures for employees . . . and Amazon's retaliatory actions against multiple employees amidst the COVID-19 pandemic."[192] The complaint stated that Amazon had failed to close any portion of its Staten Island facility after receiving information that over 250 employees had tested positive for COVID-19.[193] The Supreme Court of New York County denied Amazon's motion to

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[186] Jeremy C. Owens, *Amazon's Pandemic Profits Top Previous 3 Years of Earnings*, MARKETWATCH (Apr. 30, 2021, 7:54 AM) https://www.marketwatch.com/story/amazon-has-made-as-much-profit-during-pandemic-as-previous-three-years-of-earnings-in-total-11619726844.

[187] Annie Palmer, *Amazon Has Resumed Policies That Penalize Workers for Taking Too Many Breaks, Just in Time for Prime Day*, CNBC (Oct. 14, 2020, 6:05 PM), https://www.cnbc.com/2020/10/14/amazon-resumes-policy-that-dings-workers-for-taking-too-many-breaks.html.

[188] *Amazon.com Announces Fourth Quarter Results*, BUSINESS WIRE (Feb. 3, 2022, 4:01 PM), https://www.businesswire.com/news/home/20230201005991/en/Amazon.com-Announces-Fourth-Quarter-Results.

[189] *Attorney General James Files Lawsuit Against Amazon for Failing to Protect Workers During COVID-19 Pandemic, supra* note 185.

[190] Katherine Anne Long, *Amazon's Workforce Split Sharply Along the Lines of Race and Gender, New Data Indicates*, SEATTLE TIMES (Sept. 22, 2021, 5:08 PM), https://www.seattletimes.com/business/amazon/amazons-workforce-split-sharply-along-the-lines-of-race-gender-and-pay-new-data-indicates/.

[191] *Id.* The COVID-19 pandemic highlighted racial inequities across education, health, and employment. Generally, low-income workers were less likely to have the option of teleworking, more likely to be concerned about exposure to COVID-19, and less likely to be satisfied with the protective measures taken at their place of work compared to employed middle-income and upper-income Americans.; *see also* Parker, Menasce Horowitz, & Minkin, *supra* note 92.

[192] *Attorney General James Files Lawsuit Against Amazon for Failing to Protect Workers During COVID-19 Pandemic, supra* note 185.

[193] New York v. Amazon.com Inc., No. 45362/2021, WL 4812480, at 13 (Sup. Ct. N.Y. Co. Feb. 16, 2021) (as discussed in paragraph 54 in the complaint); *see also* Jacob Buckner, *Second Amazon Warehouse on Staten Island Files for Union Election*, PEOPLE'S WORLD (Feb. 10, 2022, 1:11 PM), https://www.peoplesworld.org/article/second-amazon-warehouse-on-staten-island-files-for-union-election/ (stating that approximately 6,000 people work at the JFK8 Staten Island facility).

dismiss the lawsuit in October 2021.[194] In November 2021, Attorney General James filed a motion seeking a preliminary injunction requiring Amazon to address health and safety concerns in its warehouses in response to Amazon's "rollback of its already inadequate public health measures" despite the influx of the Omicron variant.[195] Ultimately the case was dismissed as moot because the State had withdrawn the guidance it was seeking to enforce in the lawsuit.[196]

Additionally, Amazon had allegedly implemented a contact tracing system[197] that was intended to "identify workers who have had close contacts with COVID-19 infected workers."[198] According to Attorney General James, the system Amazon used was "legally deficient"[199] because it was inconsistent and reports of close contact with a person who tested positive[200] for COVID-19 were ignored.[201] Amazon also allegedly issued written warnings to and fired employees who reported concerns regarding COVID-19 precautions and Amazon's lack of compliance with health and safety mandates.[202]

Prior to the start of the pandemic, Amazon had a productivity policy that tracked an employee's "time off task."[203] Amazon's system logged an

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[194] New York v. Amazon.com Inc., No. 450362/2021, WL 4812480 (Sup. Ct. N.Y. Co. Oct. 12, 2021) (as discussed in the decision and order on motion).

[195] *Attorney General James Seeks Emergency Relief to Protect Rights and Safety of Amazon Workers*, LETITIA JAMES N.Y. STATE ATT'Y GEN. (Nov. 30, 2021), https://ag.ny.gov/press-release/2021/attorney-general-james-seeks-emergency-relief-protect-rights-and-safety-amazon.

[196] New York v. Amazon.com Inc., 205 A.D.3d 485, 487 (N.Y. App. Div. 1st Dep't May 10, 2022).

[197] Contact tracing is a system that notifies people who may have been exposed to someone who has COVID-19 or another infectious disease, helps those who may have been in contact with someone with COVID-19 get tested, and asks those exposed to self-isolate or quarantine if necessary. *Interim Guidance on Developing on COVID-19 Case Investigation & Contact Tracing Plan: Overview*, CTR. FOR DISEASE CONTROL & PREVENTION (Feb. 28, 2022), https://www.cdc.gov/coronavirus/2019-ncov/php/contact-tracing/contact-tracing-plan/overview.html.

[198] *Amazon.com Inc*., No. 45362/2021, WL 4812480, at 16.

[199] *Id.* at 3.

[200] To test positive for COVID-19 means the individual was presently infected with COVID-19 at the time of their test. *Understanding COVID-19 Test Results*, RUSH U. MED. CTR., https://www.rush.edu/patients-visitors/covid-19-resources/understanding-covid-19-test-results#:~:text=If%20your%20COVID%2D19%20test,possible%20according%20to%20CDC%20instruction (last visited Dec. 30, 2021).

[201] *Attorney General James Files Lawsuit Against Amazon for Failing to Protect Workers During COVID-19 Pandemic, supra* note 185.

[202] *Id.*

[203] Colin Lecher, *How Amazon Automatically Tracks and Fires Warehouse Workers for 'Productivity'*, VERGE, (Apr. 25, 2019, 12:06 PM), https://www.theverge.com/2019/4/25/18516004/amazon-warehouse-fulfillment-centers-productivity-firing-terminations; Isobel A. Hamilton, *Amazon is Changing How It Measures a Key Productivity Metric Called 'Time Off Task,' Which Workers Have Blamed for a Culture of Relentless Monitoring and Punishing Staff Who Fall Behind*, INSIDER (June 2, 2021, 5:52 AM), https://www.businessinsider.com/amazon-changing-how-it-measures-time-off-task-metric-2021-6 ("Time off task" refers to the amount of time an employee steps away from their workstation.).

employee's break from scanning packages as a "time off task" and assigns a warning if the break is "too long."[204] These policies were not initially altered to allow employees the appropriate time to utilize proper "hygiene, sanitation, social-distancing, and necessary cleaning practices" to properly combat the effects of the COVID-19 pandemic on Amazon facilities.[205] At the beginning of the COVID-19 pandemic in March 2020, Amazon continued to require employees to adhere to pre-pandemic productivity rates based on "time off task" measures, making it virtually impossible for employees to adequately follow COVID-19 guidelines.[206] Amazon suspended its "time off task" policies in late March 2020 to give employees the requisite time to follow COVID-19 protocols including sanitizing their workplace, washing their hands, and practicing social distancing.[207] The time off task policies were reinstated in October 2020.[208] A manager stated that the company reinstated the policies because "'Amazon needed its employees to work faster during peak season.'"[209]

ii. Other Examples of "Profit Over People" During the COVID-19 Pandemic

During COVID-19, low-income workers were less likely to have the option of teleworking, less likely to be satisfied with the protective measures taken at their place of work compared to employed middle-income and upper-income Americans, and more likely to be concerned about exposure to COVID-19.[210] Despite COVID-19 putting a resounding pause on the functions of the courts for some time,[211] multiple cases have illustrated the need for a private right of action in the Act to adequately address safety violations by employers. For example, the plaintiff employee in Carter v. GardaWorld Sec. Servs.[212] brought a claim alleging the defendant employer

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[204] Palmer, *supra* note 187; Shannon Liao, *Amazon Warehouse Workers Skip Bathroom Breaks to Keep Their Jobs, Says Report*, VERGE (Apr. 16, 2018, 2:11 PM), https://www.theverge.com/2018/4/16/17243026/amazon-warehouse-jobs-worker-conditions-bathroom-breaks (discussing that the standards for "time off task" were so strict that seventy-four percent of workers reported avoiding bathroom breaks in order to meet their quota.); *see also* Jay Greene, *Amazon's Warehouse Rules Lead Lawmakers to Press for Worker Protections*, WASH. POST (Sept. 10, 2021, 8:00 AM), https://www.washingtonpost.com/technology/2021/09/10/amazon-warehouse-productivity-laws/.

[205] New York v. Amazon.com Inc., No. 45362/2021 WL 4812480 (Sup. Ct. N.Y. Co. Feb. 16, 2021).

[206] *Id*.; Palmer, *supra* note 187.

[207] Palmer, *supra* note 187.

[208] *Id.*

[209] *Id.*

[210] Parker, Menasce Horowitz, & Minkin, *supra* note 92.

[211] Griff White & Mark Berman, *Long After the Courts Shut Down for Covid, the Pain of Delated Justice Lingers,* WASH. POST (Dec. 19, 2021), https://www.washingtonpost.com/national/covid-court-backlog-justice-delayed/2021/12/18/212c16bc-5948-11ec-a219-9b4ae96da3b7_story.html.

[212] Carter v. GardaWorld Sec. Servs., 2021 U.S. Dist. LEXIS 96883 (D. Md. 2021).

created a hostile work environment resulting in the plaintiff's wrongful termination.[213] The plaintiff argued that he was terminated for complaining about the defendant employer's failure to follow COVID-19 protocols and that the defendant violated requirements of the Act.[214] The court dismissed the plaintiff's claim of improper discharge after voicing complaints about the employer's failure to comply with COVID-19 protocols, as there is no private right of action provided under the Act.[215]

Many states have adopted laws that address occupational safety and health without providing a private right of action. For example, similar to the federal statute, the California Occupational Safety and Health Act ("California OSH Act") does not provide employees a private right of action.[216] In Wicker v. Walmart, Inc.,[217] employees of Walmart[218] sued the company claiming violations of the California OSH Act during the COVID-19 pandemic.[219] The plaintiff alleged that the defendant "created an environment in [Walmart's] Chino Facility that is ripe for the super-spread of COVID-19."[220] The District Court of Maryland dismissed the plaintiff's claim because of the lack of private right of action against his employer for violations of the California OSH Act.[221]

In addition to massive retail conglomerates like Walmart and Amazon, meat processing companies have also illustrated the need for a private right of action in the Act.[222] Between March and October 2020, approximately 41,000 out of nearly 500,000 meat processing workers tested positive for

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[213] *Id*. at *13.

[214] *Id*.

[215] *Id.* at *15; Owens v. Perdue Farms, Inc., 2021 U.S. Dist. LEXIS 81990, at *3 (D. Ga. 2021) (Additionally, in *Owens*, the plaintiff was employed by the defendant and was injured by machinery while on the job. The opinion states that "[s]ince OSHA does not create a private right of action, it appears that Owens cannot state a cognizable negligence per se claim upon which relief may be granted." *Owens*, 2021 U.S. Dist. LEXIS 81990, at *22.).

[216] California Occupational Safety and Health Act of 1973, Cal. Lab. Code § 6300 *et seq*; Wicker v. Walmart, Inc., 533 F. Supp. 3d 944, 950 (C.D. Ca. 2021).

[217] *Wicker*, 533 F. Supp. 3d, at 944.

[218] Lauren Debter, *The World's Largest Retailers 2020: Walmart, Amazon Increase Their Lead Ahead Of The Pack*, FORBES (May 13, 2020, 5:30 AM), https://www.forbes.com/sites/laurendebter/2020/05/13/the-worlds-largest-retailers-2020-walmart-amazon-increase-lead-ahead-of-the-pack/?sh=3b4c7cb418d3 (discussing that Walmart, another one of the country's largest retail distributors, also experienced an increase in profits through the COVID-19 pandemic like Amazon); Melissa Fares & Aishwarya Venugopal, *Walmart Beats on Profit, Posts Record Online Sales on Pandemic Boost*, THOMSON REUTERS (Aug. 18, 2020, 7:06 AM), https://www.reuters.com/article/us-walmart-results/walmart-beats-on-profit-posts-record-online-sales-on-pandemic-boost-idUSKCN25E1D7.

[219] *Wicker*, 533 F. Supp. 3d, at 946.

[220] *Id.* at 948.

[221] *Id.* at 952.

[222] Dineen, *supra* note 171, at 9.

COVID-19 and nearly two hundred died of COVID-19.[223] Despite this, following an inspection regarding COVID-19 related violations, only two meat processing plants were fined by OSHA for their failure to protect these workers from COVID-19.[224] State governments have attempted to address the meat processing plants' failure to implement infectious disease protocols during the COVID-19 pandemic through legislation.[225] For example, in July 2020 the Nebraska legislature made "attempts to address the [meat processing industry's] incomplete adoption of [infection prevention and control] measures."[226] Ultimately, these efforts were unsuccessful and failed to gain requisite support. [227]

D. Workers' Compensation Laws Are Not Enough to Make Workers Whole

State workers' compensation laws are meant to ensure that an injured employee receives the requisite medical care and lost income due to being unable to work.[228] Most workers' compensation laws do not fully address infectious diseases in the workplace; some states only provide a workers' compensation remedy for diseases that arise directly from the employee's course of work.[229] Since the claimant must prove the disease arose "out of or in the course of employment,"[230] this may also require the claimant to prove that the disease did not come from a source outside of the employment, which could be extremely difficult or impossible for the claimant to show.[231] COVID-19 poses an even more difficult hurdle for employees to overcome,

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[223] *See id.* While this article does not directly propose a private right of action in the Act, the author suggests that reform of employee protection laws is necessary to properly serve their purpose. Further, Professor Dineen's article provides a unique insight into the impact of COVID-19 on the meat processing industry and shows how COVID-19 has exacerbated the health inequities experienced by workers in this field.

[224] *Id.* at 10; *see also U.S. Department of Labor Cites Smithfield Packaged Meats Corp. For Failing to Protect Employees from Coronavirus*, U.S. DEP'T LAB. OCCUPATIONAL SAFETY & HEALTH ADMIN. (Sept. 10, 2020), https://www.osha.gov/news/newsreleases/region8/09102020; *see also U.S. Department of Labor Cites JBS Foods Inc. for Failing To Protect Employees from Exposure to Coronavirus,* U.S. DEP'T LAB. OCCUPATIONAL SAFETY & HEALTH ADMIN. (Sept. 11, 2020), https://www.osha.gov/news/newsreleases/region8/09112020.

[225] Dineen, *supra* note 171, at 12-13; *see also* Jared Austin, *Nebraska Lawmakers Reject Push for Meatpacking Restrictions*, 1011 NOW (July 29, 2020, 4:02 PM), https://www.1011now.com/2020/07/29/nebraska-lawmakers-reject-push-for-meatpacking-restrictions/.

[226] Dineen, *supra* note 171 at 12-13; *see also* Austin, *supra* note 225.

[227] Dineen, *supra* note 171, at 12-13.

[228] *Insuring Your Business, Small Business Owners' Guide to Insurance: Workers Compensation Insurance*, INS. INFO. INST., https://www.iii.org/publications/insuring-your-business-small-business-owners-guide-to-insurance/specific-coverages/workers-compensation-insurance (last visited Feb. 23, 2022).

[229] Dineen, *supra* note 171, at 31.

[230] *Id.*

[231] *Id.*

since pinpointing the exact moment of contraction of COVID-19 is challenging[232] due to the possibility of exposure outside the workplace.[233] Further, some states include clauses in their workers' compensation statutes that explicitly exclude infectious diseases affecting the public, limiting remedies only to illnesses that are "due to causes and conditions which are characteristic of and peculiar to . . . [the] . . . employment."[234] As a result, COVID-19-related harms do not apply since the public is susceptible to contracting COVID-19,[235] which makes worker's compensation an ineffective remedy for employees exposed to COVID-19.

Further, whether workers' compensation applies to COVID-19 in the workplace and whether it is the only remedy available to harmed employees varies by state and the circumstances surrounding the claim, making this an inconsistent means of recovery for injured employees.[236] Additionally, if an employee receives an award of monetary damages under a workers' compensation law after going through the required filing and reporting process,[237] the employee is only compensated for some of the losses incurred from the injury.[238]

These holes in workers' compensation laws are illustrated in Palmer v. Amazon.com, Inc.[239] Here, the plaintiffs—employees of Amazon and people who live with the employees—asserted a claim for breach of duty to provide a safe workplace and "to protect the health and safety of employees under [New York's Workers' Compensation statute]."[240] The plaintiffs claimed

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[232] Matthew Herper, *Scientists Try to Pinpoint Why Rapid Covid Tests are Missing Some Cases*, STAT (Jan. 6, 2022), https://www.statnews.com/2022/01/06/scientists-try-to-pinpoint-why-rapid-covid-tests-are-missing-cases/; *see also* Daniel Yetman, *Signs That You May Have Had COVID-19: What Research Shows,* HEALTHLINE (Aug. 9, 2021), https://www.healthline.com/health/sure-signs-you-ve-already-had-covid; *see also id.*

[233] Josh Cunningham, *COVID-19: Workers' Compensation*, NAT'L CONF. STATE LEGISLATURES (Jan. 24, 2022), https://www.ncsl.org/research/labor-and-employment/covid-19-workers-compensation.aspx (discussing that many states have enacted temporary expansions to their workers' compensation laws in light of the COVID-19 pandemic to cover essential workers or healthcare workers); *see also* An act to amend the workers' compensation law, in relation to including exposure to novel coronavirus, COVID-19 as an occupational disease, S. 8266, 2019-2020 Leg. Sess. (N.Y. 2020) (For example, New York expanded its workers' compensation law to include COVID-19 as "an occupational disease for which compensation shall be payable for disabilities sustained or death incurred by an employee" and expanded covered employee as "any and all work that causes workers to be in contact with the public.").

[234] Dineen, *supra* note 171, at 31.

[235] *Id.*

[236] *Id.*

[237] *What is the Workers' Compensation Claims Process?*, INSUREON, https://www.insureon.com/small-business-insurance/workers-compensation/how-to-file-a-claim (last visited Dec. 30, 2021).

[238] Lillard, *supra* note 161, at 333.

[239] Palmer v. Amazon.com, Inc., 498 F. Supp. 3d 359 (E.D.N.Y. 2020).

[240] *Id.*; N.Y. C.L.S. Work. Comp. § 200. The plaintiffs did not assert a claim under the Act and argued that their claims "do not implicate OSHA's expertise and discretion." One issue of the case came down to whether OSHA or the courts were the proper venue to determine whether Amazon's policies "adequately

that Amazon's "productivity requirements prevent employees from engaging in basic hygiene, sanitization, and social distancing."[241] Thus, the plaintiffs alleged that as a result of Amazon's failure to follow COVID-19 protocols, employees were put at a greater risk of contracting COVID-19.[242] The court held that the plaintiffs' claim regarding the "threat of contracting COVID-19" must be dismissed since they alleged a "threat of future harm."[243] New York Workers' Compensation laws only cover past harms, and so the future injury claimed by the plaintiffs was not a "cognizable injury" under the statute.[244] Since their claims were denied under New York Workers' Compensation law, the plaintiffs had no remedy for their harms stemming from their employment at Amazon.

IV. PROPOSAL

A. A Private Right of Action in the Act Would Hold Companies Accountable for Prioritizing Profits Over People

The Act must be amended to include an explicit private right of action for employees who have experienced adverse health and safety outcomes, such as injury or death, because of their employers' violation, and for employees whose employers have wrongfully retaliated against them for reporting such violations. Due to the inadequacies of OSHA and the lack of ability to recover from workers' compensation, without a private right of action, workers are left to suffer the consequences of their employers' misdeeds. A private right of action is equally as important for hazardous workplace conditions that do not result in injury or death. Ultimately, including a private right of action in the Act would help to incentivize employers to stop prioritizing profits over their employees' health and safety.

The COVID-19 pandemic makes clear that it is crucial for OSHA and Congress to address the shortcomings of workplace standards to avoid the same catastrophic effects that Americans have endured since March 2020. Yet, corporations have not internalized these lessons in their practices and employees continue to be disadvantaged as the COVID-19 pandemic rages on with the surges of variants through the past years.[245] The Act is ineffective in achieving its own goal of ensuring safe working conditions because it does

protect the safety of its workers during the COVID-19 pandemic." The court found that the plaintiff's claims should have been directed to OSHA as they fell into "the heart of OSHA's expertise and discretion." *See Palmer*, 498 F. Supp. 3d at 370.

[241] *Palmer,* 498 F. Supp. 3d at 366.

[242] *Id.*

[243] *Id.* at 375-76.

[244] *Id.* at 375.

[245] Rolfsen, *supra* note 9.

not provide a private right of action, and OSHA lacks the crucial funds and staff necessary to properly address all of the COVID-19 and infectious disease related complaints.[246] An amendment adding a private right of action would not only provide an incentive for employers to adhere to the standards of the Act and an incentive for employees to report employers that are violating the Act, but also would remove much of the administrative burdens plaguing OSHA by freeing up its limited resources and staff.[247] OSHA would maintain its major role in workplace safety by continuing to inspect workplaces and issue citations for violations, but it would spend less time and resources on advocating for individual plaintiffs in the courts.

A private right of action in the Act would benefit both OSHA and the public. In terms of benefits for individual employees, simply put, workplaces would be healthier as a result of amending the Act to have a private right of action. Fewer employees would be hurt or endangered on the job because private right of actions hold employers accountable since "the threat of potential legal action would [incentivize] firms to change their culture and improve their standards of conduct."[248] Another benefit of adding a private right of action to the Act is that it would encourage consistency across the nation when OSHA and the judicial system are dealing with these kinds of claims. Currently, these decisions vary from state to state, whereas a federal private right of action would promote uniformity.[249] Further, a private right of action is an efficient way to regulate the workplace given that OSHA is understaffed, underfunded, and essentially unable to fulfill its main purpose in protecting workers.[250] Finally, as this Note has previously discussed, adding a private right of action would aid in protecting employees during and after the COVID-19 pandemic for future health crises.

While there are many benefits to private rights of action, there are also disadvantages. A private right of action may result in an influx of legal

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[246] Daiquiri J. Steele, *Preserving Pandemic Protections*, 42 BERKELEY J. EMP. & LAB. L. 321 (2021).

[247] Gonzalez, *supra* note 76, at 325.

[248] SARAH O'NEILL CONSULTING, THE PROS AND CONS OF A PRIVATE RIGHT OF ACTION FOR CONSUMERS IN LIGHT OF EVIDENCE FROM OTHER SECTORS AND COUNTRIES, A REPORT FOR THE FINANCIAL SERVICES CONSUMER PANEL 8 (May 2020), https://www.fs-cp.org.uk/sites/default/files/fscp_report_final_version_23_july_20.pdf. It is important to note that this quote is in reference to financial services and the private right of action is meant to protect consumers. Consumers play a similar role in financial services as employees play in the relationship between the employer and the employee as they are vulnerable. Consumers and employees are vulnerable to being taken advantage of by sellers and employers without a means to remedy to make them whole in the form of a private right of action. As such, a private right of action is crucial to protect both groups.

[249] There is significant federal interest in creating uniformity among laws and firmly defined rules that can be easily applied. Wilson v. Garcia, 471 U.S. 261, 270 (1985).

[250] Katie Tracy, Michael C. Duff, Rena Steinzor, Sidney A. Shapiro, & Thomas McGarity, *OSHA's Next 50 Years: Legislating a Private Right of Action to Empower Workers*, CTR. FOR PROGRESSIVE REFORM (July 20, 2020), https://progressivereform.org/publications/osha50pra/.

claims in the courts, leading to delays and increased costs with more litigation for employers and employees.[251] There may also be a moral hazard issue in that employees may engage in more risky behaviors while working or frequently sue their employers under the Act.[252] Moral hazard issues in employment came to light with the unemployment subsidies paid to workers during COVID-19.[253] Many unemployed individuals elected to remain unemployed because they were making more money from unemployment than they were from their previous job before the pandemic.[254] This kind of behavior indicates that, following the addition of a private right of action in the Act, employees may sue their employers for Act violations more often than they would have without a private right of action. This problem would deviate from the ultimate goal of the private right of action in the Act, to provide redress that is currently not available, and could warp the purpose into an opportunity for financial gain and exploitation of the employer.

Some critics have argued that private rights of action "undermine appropriate agency enforcement and allow plaintiffs' lawyers to set policy nationwide, rather than allowing expert regulators to shape and balance policy."[255] Additionally, some have argued that private rights of action "hinder innovation and consumer choice by threatening companies with frivolous, excessive, and expensive litigation."[256] However, the benefits posed by implementing a private right of action in the Act outweigh the disadvantages because each injured employee has a right to their day in court against their employer who harmed them, and litigation of the claim is the most efficient way to make the employee whole.

It is clear that state efforts are not enough to provide remedies to employees who have been harmed by their employer's violations of the Act.[257] Since these efforts have been unsuccessful at the state level,[258] it is Congress that must take the reins and amend the Act to include a private right of action. Including a private right of action in the Act for these employees who have experienced dangerous and unhealthy work environments during the COVID-19 pandemic would allow for a remedy that has not been offered

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[251] SARAH O'NEILL CONSULTING, *supra* note 248, at 8.

[252] *See id.* at 9.

[253] David Surdam, *Moral Hazard in the Labor Market,* U. N. IOWA (Sept. 25, 2020), https://insideuni.uni.edu/business/moral-hazard-labor-market.

[254] *Id.*

[255] Melissa Bianchi, Mark W. Brennan, Adam Cooke, Joseph Cavanaugh, & Alicia Paller, *Ill- Suited: Private Rights of Action and Privacy Claims*, HOGAN LOVELLS (July 19, 2019), https://www.engage.hoganlovells.com/knowledgeservices/news/ill-suited-private-rights-of-action-and-privacy-claims. It should be noted that this article refers to a private right of action in privacy cases.

[256] *Id.*

[257] Dineen, *supra* note 171, at 12-13; *see also* Austin, *supra* note 225.

[258] Dineen, *supra* note 171, at 12-13; *see also* Austin, *supra* note 225.

through de minimis fines on the company from OSHA.[259] Federal intervention is necessary given the lack of success in state legislatures.[260] Employees, including the employees of Amazon who were subjected to unsafe working conditions without the opportunity to receive any adequate remedy if harmed,[261] would also reap the benefits of a private right of action in the Act.

B. A Private Right of Action Fills in the Holes Left by Workers' Compensation Laws

Not only would a private right of action for violations of the Act disincentivize companies from putting profits before the welfare of employees, but this remedy would also help to fill in the gaps in workers' compensation statutes.[262] Where an employee is not able to recover under workers' compensation statutes for the potential exposure to infectious disease, such as in Palmer v. Amazon.com, Inc., a private right of action in the Act would provide an opportunity for a plaintiff to rightfully recover damages for injuries they have suffered.[263] Had there been a private right of action under the Act, the plaintiffs in Palmer may have had a better opportunity, with or without injury, to receive damages after being subjected to a dangerous workplace during a deadly pandemic.[264]

A private right of action in the Act is not meant to preempt or disturb workers' compensation laws.[265] Rather, it is intended to fill the gaps in

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[259] Tracy, Duff, Steinzor, Shapiro, & McGarity, *supra* note 250.

[260] Dineen, *supra* note 171, at 12-13; *see also* Austin, *supra* note 225.

[261] New York v. Amazon.com Inc., No. 45362/2021, WL 4812480, at 13 (Sup. Ct. N.Y. Co. Feb. 16, 2021); Palmer v. Amazon.com, Inc., 498 F. Supp. 3d 359, 364 (E.D.N.Y. 2020).

[262] *See Palmer,* 498 F. Supp. 3d at 374 (holding the plaintiffs' claim based on past injury and threat of contracting COVID-19 were barred by New York's workers' compensation statute); *see also* Lillard, *supra* note 161 at 333 ("At best [the whistleblower] feels compensated, long after the fact, for some of the losses he incurred").

[263] Tracy, Duff, Steinzor, Shapiro, & McGarity, *supra* note 250.

[264] *Id.*

[265] 42 U.S.C. § 2000e-7 poses a template for this. In relevant part, it states "[n]othing in this title shall be deemed to exempt or relieve any person from any liability . . . provided by any present or future law of any State . . . other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice." Currently, the Act states, "[n]othing in this Act shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law. . . ." Occupational Safety and Health Act, 29 U.S.C. § 653(4). The Americans with Disabilities Act has the same provision. Baumgardner v. Cnty. Of Cook, 108 F. Supp. 2d 1041 (N. D. Ill. 2000). The Americans with Disabilities Act, in relevant part, provides people living with disabilities the ability to bring an action against individuals who violate the Americans with Disabilities Act. "No person shall discriminate against any individual because such individual opposed any act or practice made unlawful by this Act . . . [the] remedies and procedures available under sections 107, 203, and 308 of this Act [42 USCS §§12117, 12133, 12188] shall be available to aggrieved persons for

recovery left by workers' compensation laws as well as provide a venue for employees who may be harmed in the future because of the employer's violations of the Act, which workers' compensation does not allow.[266] Thus, with a private right of action in the Act, an employee could pursue recovery from state workers' compensation laws and then sue for violations of the Act for the damages that workers' compensation would not cover. For example, as this Note previously mentions, it would be unlikely for an employee to receive workers' compensation after contracting or being put in danger of contracting COVID-19 while working in an unsafe environment.[267] Under a private right of action in the Act, the employee could sue their employer for damages that would make the employee whole after being exposed to a dangerous workplace.[268] Alternatively, even if an employee received workers' compensation, the employee could still sue their employer for other damages that would make the employee whole.[269] The goal of the private right of action in the Act in light of workers' compensation laws is to supplement, rather than replace, the recovery.

C. Constructing a Private Right of Action in the Act

i. Other Statutes with Private Rights of Action

There are several other employment related statues that include a private right of action.[270] For example, the Fair Labor Standards Act of 1938,[271] provides protections for employees who believe they were discriminated against in violation of the statute and explains how they may seek relief.[272] This section provides that for an employee to submit the claim, they must follow the procedure enumerated in the Consumer Product Safety Improvement Act:[273]

> If the Secretary has not issued a final decision within 210 days after the filing of the complaint, or within 90 days after receiving a written determination, the complainant may bring an action at law or equity for de novo review in the appropriate district court of the United States with jurisdiction. . . . The

violations of subsections (a) and (b). . . ." Americans with Disabilities Act of 1990, 42 U.S.C.S. § 12203(a)-(c).

[266] *See Palmer*, 498 F. Supp. 3d at 375. A private right of action in the Act would have given recourse to the plaintiffs in *Palmer* not barred by workers' compensation statutes.

[267] *Id.; see also infra* Section IV(D).

[268] Tracy, Duff, Steinzor, Shapiro, & McGarity, *supra* note 250.

[269] This is discussed more in depth below, *see infra* Section V(C)(ii).

[270] *Id.*

[271] Fair Labor Standards Act of 1938, 29 U.S.C. § 218c(b)(1)-(2).

[272] *Id.*

[273] Consumer Product Safety Improvement Act, 15 U.S.C. § 2087(b)(4); *Id.*

> court shall have jurisdiction to grant all relief necessary to make the employee whole, including injunctive relief and compensatory damages[.][274]

The statute goes on to describe the potential damages an employee may receive. The damages may include back pay with interest, compensation for any relevant damages from the adverse employment action, such as litigation costs, expert witness and attorney's fees[275] and reinstatement to the same role and status that the employee had prior to the discriminatory act.[276] This statute was implemented decades before the Act and grants a private right of action with comprehensive damages with the purpose of "[making] the employee whole."[277] In Bailey v. Dejoy,[278] the plaintiff employee asserted a claim against her employer under this section but the claim was dismissed because the plaintiff did not properly adhere to the procedure in filing the complaint.[279]

The Family and Medical Leave Act[280] also includes a private right of action for employees against their employer who violated the statute.[281] The violations include discrimination, such as unlawful discharge,[282] and violating the actual terms of the statute, which allows an eligible employee twelve weeks of leave under certain circumstances.[283] The statute reads:

> Right of action. An action to recover the damages or equitable relief prescribed in paragraph (1) may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of –
> (A) the employees; or
> (B) the employees and other employees similarly situated.[284]

Also, the plaintiff may receive reasonable attorneys' fees and expert witness fees.[285] Any costs of the action are to be paid by the defendant employer.[286] The damages may also take the form of wages or other compensation denied or lost because of the violation or the actual monetary losses suffered by the employee.[287] The Supreme Court enumerated restrictions on the damages an

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[274] 15 U.S.C. § 2087(b)(4).
[275] 15 U.S.C. § 2087(b)(4)(B)-(C).
[276] 15 U.S.C. § 2087(b)(4)(A).
[277] 15 U.S.C. § 2087(b)(4).
[278] Bailey v. Dejoy, No. 1:20-cv-00042-JAW, 2021 U.S. Dist. LEXIS 35831 (D. Me. 2021).
[279] *Bailey*, No. 1:20-cv-00042-JAW, 2021 U.S. Dist. LEXIS 35831, at *15.
[280] Family and Medical Leave Act, 29 U.S.C. § 2617(a)(2).
[281] 29 U.S.C. § 2615(a)(1)-(2); Schobert v. CSX Transp. Inc., 504 F. Supp. 3d 753, 799 (S.D. Ohio 2020).
[282] 29 U.S.C. § 2615(a)(1)-(2).
[283] 29 U.S.C. § 2612(a)(1).
[284] 29 U.S.C. § 2617(a)(2)(A)-(B).
[285] 29 U.S.C. § 2617(a)(3).
[286] *Id.*
[287] 29 U.S.C. § 2617(a)(1)(A)(i)(I)-(II).

employee may receive in Nevada Department of Human Resources v. Hibbs.[288] Damages are to be measured by actual monetary losses incurred by the employee and backpay is limited by the two or three-year statute of limitations in the Family and Medical Leave Act.[289]

Congress should draw upon these statutes when drafting a private right of action for the Act. These statutes were chosen to illustrate what a private right of action looks like in an employment context and shows how amending the Act to include one is crucial to make harmed or exposed employees whole.

ii. A Private Right of Action in the Act–What Would this Look Like?

This section will detail what a private right of action in the Act should specifically include regarding damages available, to whom should damages be paid, the requisite standard of liability, and OSHA's role in private actions. It is important to note while reading this section that the primary goal of the private right of action in the Act is to make the injured or exposed employee whole.

What damages would be available? The main purpose of a private right of action in the Act would be to provide an effective route for injured employees to be made whole. As such, the private right of action in the Act should mimic the structure laid out in the Fair Labor Standards Act of 1938, which points to the process enumerated in the Consumer Product Safety Improvement Act, which explicitly states its intention is to make the employee whole.[290] The remedies made available by the private right of action should include reasonable attorneys' fees, expert witness fees, and compensatory damages. The expert witness fees are especially important if a plaintiff uses an empirical or expert study to support their claim.[291] If the plaintiff employee is required to use expert testimony and the whole purpose of the amendment to the Act is to make the employee whole, plaintiffs should be reimbursed for the expensive expert witness fees required to meet their burden. Remedies such as attorneys' fees and expert witness fees would compensate employees who have been subjected to dangerous working conditions without being injured. In these cases, damages to cover emotional

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[288] Nevada Dep't Hum. Res. v. Hibbs, 538 U.S. 721, 739-40 (2003).

[289] *Nevada Dep't Hum. Res.,* 538 U.S. at 740. There is a three-year statute of limitations for willful violations and all other violations are subject to a two year statute of limitations.

[290] 29 U.S.C. § 218c(b)(1)-(2); Consumer Product Safety Improvement Act, 15 U.S.C. § 2087(b).

[291] *See* Tesone v. Empire Mktg. Strategies, 942 F.3d 979, 996 (10th Cir. 2019) (the court found that "whether medical evidence is necessary to support a disability discrimination claim is a determination that must be made on a case-by-case basis" and that "[c]ourts generally require expert evidence when 'a condition would be unfamiliar to a lay jury and only an expert could diagnose that condition'") (quoting Mancini v. City of Providence, 909 F.3d 32, 41).

distress from working in an unsafe environment may also be appropriate to make the employee whole depending on the circumstances and experiences of the employee.

Additionally, if an employee asserts a claim for retaliation and was demoted or terminated, the employee should be reinstated to their previous role before the adverse employment action, as in the process adopted by the Fair Labor Standards Act of 1938, which states an employee should follow the procedure in the Consumer Product Safety Improvement Act.[292] Since the purpose of the private right of action is to make the employee whole, a limit on damages is not necessary as the damages will still be subject to a reasonableness standard.

Where would the damages go? While the relevant damages to make the employee whole would go directly to the employee, there remains a question as to whether some amount of the fine that should go directly to OSHA. Since OSHA is significantly underfunded,[293] the financial recovery from the litigation that will occur as a result of the addition of a private right of action may mitigate that inefficiency of OSHA. If OSHA imposed a fine on violating employers, the scaled fines already included in the Act[294] would provide notice to employers about the financial consequences they may face if they violate the Act. OSHA should only receive the money from the fine imposed against violating employers if OSHA or the Secretary is a party to the suit.[295] However, if the Act required violating employers to pay a fine directly to OSHA, this may violate the existing process in which employer fines go directly to the Treasury.[296] As to not disrupt this well-ingrained practice, and to support the purpose of making the employee whole—as opposed to making OSHA whole—the employer should pay damages solely to the employee.

In the event that more than one employee is injured, the employer should pay damages to the employee or employees who bring the action against the employer under the private right of action. This would prevent a free-rider problem in which employees who do not bring an action benefit

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[292] 15 U.S.C. § 2087(b); *see also* 29 U.S.C. § 218c(b)(1)-(2).

[293] Panetta, *supra* note 6.

[294] *See* Occupational Safety and Health Act, 29 U.S.C. § 666.

[295] 42 U.S.C. § 1981(a)(b)(1) (This is similar to the system in place under Title VII for punitive damages. This act says that "[a] complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual." Additionally, the cap on damages, both compensatory and punitive, are determined by the number of employees the employer has.).

[296] 29 U.S.C. § 666(l).

from the compensation that was received by the employee or employees who did bring the action.

What is the standard of liability? The standard of liability in a private right of action in the Act would rely upon whether the employer violated a standard or requirement of the Act, retaliated against an employee, or unlawfully discriminated against the employee in relation to a standard violation. Once the employer creates or ignores an unsafe or unhealthful condition in the workplace, that is a violation of the Act for which the employee would be able to assert the private right of action. In a COVID-19 context, this would mean not following COVID-19 related mandates or protocols, leading to an unsafe workplace where employees are more susceptible to COVID-19 than if the protocols were properly followed.

Where does OSHA fall in all of this? It is crucial that OSHA remain an active participant in employee claims against employers. The private right of action should be in addition to the administrative process already facilitated by OSHA and the Act. This is to ensure plaintiffs still have an avenue for redress if they do not wish to go to trial. Despite OSHA's structural inadequacies, it has more expertise in the realm of employee rights and Act violations than independent plaintiffs. OSHA has the inspection power as well as the information and research abilities to make the private right of action effective.[297] For example, if the Secretary chose not to file a claim against the employer, OSHA could still provide the plaintiff employee with information from previous OSHA inspections.[298] This will better prepare the plaintiff for litigation. In addition, keeping OSHA involved in this process would allow for remedial results. For example, in a case where a plaintiff brings a claim against their employer for retaliation for reporting an Act violation and the court finds in favor of the plaintiff, OSHA can implement remedial measures. The measures may include a requirement that the employer host weekly trainings about workplace safety or a reporting requirement, thereby ensuring the workplace is safe for employees, or, at the very least, that the employer is taking concrete measures mandated by OSHA to make the workplace safer.

V. CONCLUSION

The Occupational Safety and Health Act lacks a private right of action for employees to sue their employers directly for violations that may or may not result in harm.[299] This lack of a private right of action, coupled with the structural failings of OSHA, have allowed employers to put profit over the

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[297] Tracy, Duff, Steinzor, Shapiro, & McGarity, *supra* note 250.

[298] *Id.*

[299] *See* 29 U.S.C. §§ 651 et seq. At no point in the entire Act is there an explicit private right of action. As discussed in Section III(A)(a), there is no implicit right of action as interpreted by the courts in the Act.

safety and health of their employees.[300] The COVID-19 pandemic has shown that now more than ever, a private right of action in the Act is necessary to adequately address the health and safety of employees. The current processes for employees who have been harmed by their employer's violations of the Act are insufficient to fulfill their needs or to make them whole. A private right of action in the Act is long overdue and is necessary considering the COVID-19 pandemic. Without a private right of action, employees will continue to suffer from the consequences of their employer's violations and from the inadequacies and ineptitude of OSHA and the Act. Finally, a private right of action in the Act would emphasize what is most important: putting people before profits.

[300] *See* Tracy, Duff, Steinzor, Shapiro, & McGarity, *supra* note 250; *see also Ashley Furniture faces $1.76M in Fines After OSHA Finds More Than 1,000 Worker Injuries at Wisconsin Site in Past 36 Months*, *supra* note 175.