



Jurisprudence and health law

New law preventing COVID-19: the first effort to prevent occupational transmission of disease of the 21st century in the USA

Jurisprudência e legislação sanitária comentadas

Nova legislação de prevenção da COVID-19: o primeiro esforço para prevenir a transmissão de doença no local de trabalho no século 21 nos EUA

Jurisprudencia y legislación sanitária

Nueva legislación para la prevención del COVID-19: el primer esfuerzo para prevenir la transmisión en el lugar de trabajo de la enfermedad del siglo 21 en los EUA

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Abstract

No one has been untouched by the COVID-19 pandemic of 2020, which underscores the principle that there is an inextricable link between health, work and the global economy of civil society. The goal of this article is to describe law in the USA that was written during the 2020 pandemic to mobilize occupational health tools that could stem the tide of the pandemic. The COVID-19 pandemic in 2020 transformed previously stoic economic sectors such as airlines, hotels, food service and major stores into marginal employers. Essential workers in food, retail delivery and health care workers confronted health risks from occupational, transmission of communicable disease. Among workers with school children impacted by COVID-19 Emergency Executive orders to *stay in place*, e-learning and remote work, e-hospital data collection and health status monitoring, returning to school as teachers or nonessential workers also generated fear of workplace transmission of disease that might infect their family. Using legislative policy analysis methods, this article describes the traditional principles of state labor relations that were rewritten using the legislative pen, now instead requiring risk assessment for all employees and employers to thereby prevent occupational transmission of disease. As discussed here, Virginia, the USA state, responded with a COVID-19 prevention law deploying modern industrial hygiene tools with broader jurisdiction compared to state labor law precedents. As a result, swift administrative action, justified for pandemic response, underscores that marginal employers and their workers need strong occupational health and safety laws, because health is inextricably linked to creating thriving commerce.

Keywords

Coronavirus Infections. Health Law. Occupational Health. Health Personnel.

Resumo

Ninguém permanece intocado pela pandemia da COVID-19 em 2020, o que enfatiza o princípio de que existe uma relação indissociável entre saúde, trabalho e a economia global da sociedade civil. O objetivo deste artigo é descrever a legislação dos EUA produzida ao longo de 2020 a fim de implementar mecanismos de saúde ocupacional que poderiam

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inverter a onda da pandemia. A pandemia da COVID-19 transformou setores econômicos anteriormente estáveis – como companhias aéreas, hotéis, restaurantes e grandes empresas de varejo – em empregadores marginais. Trabalhadores essenciais de restaurantes, entregas de mercadorias e profissionais de saúde enfrentaram riscos associados à transmissibilidade da doença ao desempenhar suas atividades profissionais. Entre os trabalhadores com filhos em idade escolar, confrontados com as ordens executivas para se confinarem em casa, com o uso do ensino e trabalho à distância e a coleta de dados de saúde por meio de teleconsultas, a perspectiva de retomarem ao ensino presencial ou regressarem aos seus postos de trabalho não essenciais gerou o receio de transmissão no local de trabalho e consequente infecção dos familiares. Por meio da análise das políticas implementadas, este artigo descreve os princípios tradicionais de trabalho que foram reescritos pela caneta do legislador, privilegiando-se agora a avaliação do risco de transmissibilidade da doença no local de trabalho. Conforme será discutido, o estado da Virgínia, EUA, respondeu com uma lei de prevenção da COVID-19 que emprega equipamentos de higienização industriais modernos com jurisdição de amplitude sem precedentes na lei das relações laborais com o Estado. Concluindo, a célere atuação administrativa, justificada na resposta à pandemia, enfatiza que os empregadores marginais e os seus trabalhadores necessitam de leis laborais de saúde e segurança fortes, já que a saúde é indissociável de um comércio próspero.

Palavras-chave

Infecções por Coronavírus. Direito Sanitário. Saúde do Trabalhador. Pessoal de Saúde.

Resumen

Nadie permanece ajeno a la pandemia de COVID-19 en 2020, que subraya el principio de que existe una relación inseparable entre la salud, el trabajo y la economía global de la sociedad civil. El propósito de este artículo es describir la legislación estadounidense elaborada a lo largo de 2020 para movilizar los mecanismos de salud ocupacional que podrían cambiar el rumbo de la pandemia. La pandemia de COVID-19 ha transformado sectores de actividad económica anteriormente estoicos, como compañías aéreas, hoteles, restaurantes y grandes minoristas, en empleadores marginales. Los trabajadores esenciales de restaurantes, los repartidores de mercancías y los profesionales de la salud se enfrentaron a riesgos asociados a la transmisibilidad de la enfermedad en el contexto del desempeño de sus actividades profesionales. En cuanto a los trabajadores con hijos en edad escolar, ante órdenes ejecutivas de confinamiento en el hogar, la introducción de la docencia y el trabajo a distancia, la recolección de datos de salud a través de teleconsultas, la perspectiva de retomar la educación presencial o regresar a sus trabajos no esenciales, generaron cierto temor de transmisión en el lugar de trabajo y la consecuente infección de los miembros de la familia. A través del análisis de las políticas implementadas, este artículo describe los principios tradicionales del trabajo en el servicio público que fueron reescritos por la pluma del legislador, privilegiando ahora la evaluación del riesgo de transmisibilidad de la enfermedad en el lugar de trabajo. Como se discutirá, el estado de Virginia, EE. UU. respondió con una ley de prevención de la COVID-19 que emplea equipos modernos de higiene industrial con una jurisdicción de amplitud sin precedentes en la ley de relaciones laborales con el estado. Como resultado, una acción administrativa rápida, justificada para responder a la pandemia, enfatiza que los empleadores marginales y sus trabajadores necesitan leyes laborales sólidas en materia de salud y seguridad, ya que la salud está indisolublemente ligada al comercio próspero.

Palabras clave

Infecciones por Coronavirus. Derecho Sanitario. Salud Laboral. Personal de Salud.

Everybody's job: preventing occupational transmission of COVID-19

Occupational health programs about COVID-19 exposure in the workplace under Virginia Law provide an example of how laws changed in order to meet public needs during the pandemic (1). On March 12 2020 Rutgers University Environmental and Occupational Safety and Health Institute (EOSHI) in New Jersey, USA, held a webinar forecasting over two hundred thousand cases of COVID-19 locally and thousands of deaths (2). This calculation was the cornerstone of calls for public health protection anticipating that hospitals would swiftly become saturated with COVID-19 cases. Similarly, projections by the Johns Hopkins University Coronavirus Resource Center (3) predicted and tracked millions of USA cases that followed.

Legislative policy analysis: is pandemic exposure an ordinary disease of life?

Typical of pandemics but unusual compared to workplace infectious disease exposures, COVID-19 has been addressed by a wide range of emergency orders with varying limits upon the movements and behaviors of non-essential workers who must stay home under law. During pandemics, essential tasks must be performed by someone for the greater good of society and therefore any question of individual choice or right to refuse hazardous risks is removed from calculus of risk equations. With a rapidly changing definitions of COVID-19 (4), people working in grocery stores, pharmacies, delivery staff and cleaning staff in addition to first responders and health care workers faced unquantifiable risk from occupational exposure to disease. Many had disease under one definition but not another, or were asymptomatic and continued working.

When billions people globally were mandated or recommended to stay home under lock down, the only people exposed to COVID-19 through their work during the lockdown were, by definition, essential workers. Without heroes on the frontlines there would be even more disease. Someone must do that job even if some people refuse to do it, in order to protect the greater society. As UK lawyer Kevin Bampton noted, during lockdown when non-essential workers are home, essential workers are implicitly exposed to COVID-19 when they perform their work. UK occupational health law therefore considers workplace COVID-19 exposure during restricted times as a reportable biological incident. These distinctions among workers are clear, and the nexus between exposure and potential risk of harm to the worker and family is also apparent.

By contrast, under non-pandemic conditions, or in the case of non-essential workers who risk exposure to occupational transmission of disease, the general question whether occupational exposure to contagious or infectious diseases is an occupational disease leading to workers compensation has been controversial for centuries. Legislative linedrawing outlining occupational disease protections and compensation are the basic model in USA law. These demarcations between employee exposure and subsequent employer liability, perhaps drawn too tightly in the first place are narrow tools that undervalue the importance of using places of employment as a tool for attempting to control exposure and impacts of disease, by trying to prevent the spread of disease through occupational transmission. Initially suggested as relevant to COVID-19, an effort to resurrect these narrow, deceptively simple exclusions for any *ordinary disease of life* from protection against occupational transmission of disease was rejected in Virginia in 2020. Historically, so-called ordinary diseases of life fit well established medical consensus limiting workers recovery in the USA, based on the idea that the illness would have occurred somewhere anyway, and therefore the employer was not responsible for conditions leading up to the illness that followed from exposure to disease at work. The term recalls the common law of the 18th and 19th century, before harsh common law limits on recovery for injured workers were replaced by workers compensation laws that allowed remedies following death or injury on the job². The antiquated term was used to systematically prevent workers compensation if the employer could prove that an illness was genetic or congenital or part of non-pandemic communicable disease. Miscarriage or birth defects caused by workplace exposure during pregnancy were also excluded as *ordinary* due a presumption of their non-occupational origins. Since 1990 however, the term also conflicts with employer obligations under USA federal law and Virginia state human rights laws requiring reasonable accommodation for people with disabilities so long as they can perform the essential functions of their job (5, 6). The requirement of accommodation does, from a practical standpoint, fly in the face of the

² Too many widows won impressively large judgments for the unholy Trinity to survive into the twentieth century, but its ghost has strong resilience in the term "ordinary disease of life" which refers in general to diseases not even remotely related to work. This phrase was also used to deny workers compensation for any accidents leading to adverse birth outcomes during pregnancy because pregnancy was deemed ordinary. For example, Huntington's disease is a late onset genetic disease resulting in dementia among otherwise normally functioning people aged fifty and above. A person with sudden onset of Huntington's disease who was involved in an accident at work would have a difficult time obtaining workers compensation under this rule despite the no fault features of workers compensation unless there were witnesses to a clear and present danger such as a broken scaffold at a construction site. But if the onset of dementia was a cause of the faulty scaffold by the injured worker, then the employer would have an affirmative defense to claims of workers compensation under these draconian rules.

notion that employers cannot be held responsible for occupational exposures on the job among sensitive populations.

Significantly, the circumstances are not ordinary, however, when a pandemic becomes so severe that airlines stop, the Olympics were cancelled, and primary elections were delayed. The relevant legal term of art to describe such extreme and unpredicted circumstances is not *ordinary* but *Force majeure*. Pandemic force majeure creates the problem that someone must be exposed to the novel lethal virus, for the greater social good. On the contrary, the new law sets forth a higher duty than usual to obey laws preventing COVID-19 occupational transmission in order to protect society at large (1) and does not draw a distinction between essential and on-essential workers based on job description. Instead, the new Virginia law requires each employer to determine the risk category for the worker, based on several factors including their job, but holds every employer in the state responsible for taking action to prevent occupational transmission of COVID-19 across all work performed. The Virginia law, finalized in January 2021 (1) applies to all workplaces in the jurisdiction, with a sliding scale of worker protection using the calculus of risk (for determining the level of protection required) that is written into the law.

Discussion: pandemic response to COVID-19, applying sound industrial hygiene laws

Politicians across the globe in jurisdictions large and small are urging the return to normal, claiming that their strategies will return business to work as soon as possible because the COVID-19 pandemic of 2020 has transformed previously stoic economic sectors into marginal employers: airlines, education, tourism, retail shopping in malls and department stores, theatres, restaurants and catering are but a few examples of the bedrock economic sectors that have been devastated by the pandemic's economic impact. Well established approaches for workplace protection are therefore taking center stage, because sound occupational safety and health programs save the life of marginal employers large or small (7). In this context, Virginia law offers an impressive new use of industrial hygiene to control transmission of disease in the workplace across all work categories in every place of employment (1).



USA emergency orders addressing COVID-19 without centralized public health authority under the US Constitution

The first step of pandemic response under USA law was a Presidential Executive Order that banned travel to USA from many countries (8). Soon, similar restrictions on travel were subject to executive order in every nation (9). This step was unusual, because the realm of public health law is reserved to the states under the USA Constitution. The US Supreme Court has often referred to federalism as striking the balance in favor of states' rights, allowing diverse policies to be developed in the *laboratories of the States*, and USA public health law in response to COVID-19 has respected this Constitutional tenet. State constitutions, in turn, often accede these responsibilities to local governments, whether large cities like Chicago, or very small towns. Local COVID-19 emergency orders might use sweeping language, exceeding their drafter's power, but few have been challenged. COVID-19 emergency orders may also be inconsistent within in the same state; some orders require citizens to shelter in place, with criminal penalties for unauthorized outings, but others do not. Some are silent regarding closing schools; others mandate homeschooling. And there are unusual provisions: Georgia kept open massage and tattoo parlors and sale of guns, but did not require masks under state law.

The inherently piecemeal approach to public health law across the nation also generated confusion. Although the Centers for Disease Control and Prevention (CDC) serve as a role model for outstanding research across the world, it has no federal power to regulate, inspect or enforce the fruits of their respected research; their leaders serve at the political will of the Executive. Additional federally-funded health care emergency actions are carried out by Federal Emergency Management Agency (FEMA). In 2020, people were tested for COVID-19 with supplies flown in by FEMA, using pop-up tents in parking lots. Tents were not equipped to collect data on urgent care or chronic illness (such as diabetes, cancer, venereal disease, influenza, hepatitis or polio). Adding to confusion, the US Congress passed 880-page legislation addressing economic consequences of COVID-19, without instituting uniform health insurance across the nation (10).

US Congress Family First CARES Act

Two trillion US dollars allocated under the auspices of 880-page *Family First Coronavirus Aid, Relief, and Economic Security Act* (CARES Act) provided sweeping promises of paid family leave, unemployment relief, and funding for major employers whose

future existence became precarious during the pandemic (11) with the stated purpose: “Providing emergency assistance and health care response for individuals, families”. Perhaps the biggest winner in this package is telehealth, which had been greeted with skepticism prior to COVID-19 (11). These provisions allow payment for enhanced Medicare telehealth services for federally qualified health centers and rural health clinics during the emergency, with a temporary waiver to allow face-to-face visits for some patients with their physicians, and increased hospice care.

Hello, DOLI: Virginia Department of Labor and Industry writes new rules

The Virginia Department of Labor and Industry (DOLI) issued an emergency temporary standard for workplace exposure to COVID-19, in July 2020 (1), and finalized in January 2021. Its unique provisions illustrate the tsunami of legal and societal change brought forth by COVID-19 because its terms reflect the reality that non-essential workers will eventually reduce their remote work even though there will be an ongoing pandemic, and will therefore face the same risks of occupational transmission of disease as essential workers. Equity dictates protection for people who were essential workers because their job inevitably causes risk of occupational transmission during the COVID-19 emergency with attendant protections under law for workplace exposure to disease. But once lockdown eases, never required or ended, the situation was no longer simple. People who work in non-essential jobs during the pandemic in the non-lockdown context faced the risk of exposure from colleagues, customers and the general public and might expand the pandemic by spreading the disease to their families. The law recognizes therefore that the risk of exposure exists in every place of employment in the state. This complex analysis of risk management variables reflects the admixture of circumstances confronting each worker without regard to age, sex, race, skill set, training or seniority in the organization (12).

To combat the growing problem created by superspreading of disease while attempting to restore the economy, DOLI’s law “shall apply to every employer, employee, and place of employment in the Commonwealth of Virginia within the jurisdiction of the VOSH program” (1) without listing exceptions. Based on innovative use of virtual meetings on January 12-13 2021 to consider the final language of the permanent COVID-19 standard in light of a flood of public comment (13), Virginia’s final version of the new law requires masks, social distancing and several key protective measures in all workplaces in the jurisdiction, with a sliding scale of protective measures based on the level of risk in the assigned tasks.

Protective rules about personal protective equipment, respiratory protective equipment, sanitation, access to employee exposure and medical records, occupational exposure to hazardous chemicals in laboratories, hazard communication apply to COVID-19 in-house occupational safety and health programs, even if those rules were written and implemented without mentioning COVID-19 (14). If there is a conflict with existing VOSH law the more stringent requirement for health protection applies, unless “PPE is not readily available on commercially reasonable terms and the employer or institution makes a good faith effort” in the event supplies are limited during the pandemic.

Significantly from the standpoint of codifying modern industrial hygiene principles, employee exposure risk level is defined under the standard using a scale of *very high, high, medium, or lower risk levels* by calculating key variables. A modern approach to industrial hygiene found in the new law recognizes that various hazards or job tasks at the same place of employment can be designated as different levels of risk. Furthermore, the law recognizes that some job tasks prohibit an employee from exercising physical distancing from other persons and has set forth provisions accordingly.

Unlike traditional occupational health and safety laws, these protective measures are remarkable because the level of protection required under law is not determined by industrial classification or economic sector of the employer. Instead, the requisite protection is shaped by the potential for actual exposure to other people and potential exposure to disease in the context of other hazards of the job. The law assumes that there will be differing levels of risk, requiring different types of protection even when two people work for the same employer, in the same place of employment. This calculus of risk for determining the level of protection required for each worker is set forth in the law, with special provisions for immune-compromised workers. The law also incentivizes compliance with CDC guidelines whenever possible, but notes their juridical limits. Interestingly, Section E. tries to resolve the complex and murky relationship between CDC guidelines, (whether mandatory or non-mandatory, to mitigate COVID-19 disease related hazards or job tasks) and local laws by mandating that “the Commissioner of Labor and Industry shall consult with the State Health Commissioner for advice and technical aid before making a determination related to compliance with CDC guidelines” (1).

Factors that

[...] shall be considered in determining exposure risk level include, but are not limited to: a. The job tasks being undertaken, the work environment (e.g., indoors or outdoors), the known or suspected presence of the SARS-CoV-2 virus, the presence of a person known or suspected to be infected with the SARS-CoV-2 virus, the number of employees and other persons in relation to the size of the work area, the working distance between employees and other employees or persons, and the duration and frequency of employee exposure through contact inside of six feet with other employees or persons (e.g., including shift work exceeding eight hours per day); [...] (1).

Hazards such as exposure to respiratory droplets and potential exposure to the airborne transmission are included in the calculus of risk too. Additionally, contact with contaminated surfaces or objects, such as tools, workstations, cafeteria tables, shared spaces such as shared workstations, break rooms, locker rooms, shared vehicles must also be controlled. The new law is designed to establish requirements for employers to control, prevent, and mitigate the spread of SARS-CoV-2 (COVID-19) to and among employees and employers (1), without requiring vaccination or contact tracing. Return to work after a positive COVID-19 test for asymptomatic workers, or for workers who have been ill with COVID-19 is also discussed in detail. This is possibly the most problematic aspect of the new law, and the most essential to preventing occupational transmission of disease. The law bravely sets forth the procedures to follow for safe return to work, but their feasibility and impact is yet unknown.

Conclusions: COVID-19 exposure brings home the inextricable link between work health proves we are one world

The COVID-19 crisis illuminates the significance of health as a right internally linked to the economic wellbeing of employers, as demonstrated by the new Virginia law. Frontline workers who by job description are compelled to confront COVID-19 as a global threat to health everywhere suggests the definition of occupational disease should embrace their workplace exposure to COVID-19. Furthermore, the potential for occupational transmission to and by non-essential workers becomes apparent as lockdowns are relaxed or in places where lockdowns do not occur at all. In that context, the difference between essential and non-essential workers becomes blurred and the same principle of exposure in the workplace during pandemics as a social necessity comes to the fore. If nobody accepted those risks our entire civil society would be far more vulnerable to succumbing to the disease. That is why they are considered essential workers. Therefore, Virginia laws attempt to reject traditional infectious disease paradigms because of the force majeure of the COVID-19 emergency

represents an important step forward for the future of occupational health as well as a step towards controlling the pandemic.

In conclusion, the COVID-19 global crisis provides a tragic example of a rude wakeup call to civil society regarding the underlying need to address public health infrastructure inadequacies in locally internationally and in countries large or small that consider the impact of otherwise ordinary diseases of life and the potential for transmission of those diseases in the workplace. This approach may always have been a practical idea but was not previously required under law. Trends for pandemic preparation are therefore likely to build upon this innovative approach to occupational transmission, to recognize and track disease, and ultimately to save lives from the spread of disease in the workplace even if its presence has a non-occupational origin. The inescapable conclusion from the totality of pandemic executive orders and new laws remains that health is fundamental to civil society and therefore requires protection in every corner of the world. Therefore, in this crucial societal-defining time should echo the teachings of Prof. Leon Gordis, Chair of the department of epidemiology, who was also an outstanding, award-winning compassionate medical doctor at John's Hopkins University School of Public Health who in his lecture reminded students that humans are arrogant in the medical business: "when we say we are saving lives ... We are not saving lives because ultimately everyone will die. So, what are we doing here in public health? Our goal is the relief of suffering and pain. Our mission is to improve the quality of life". *Let's get to work!*

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Acknowledgements

The Author wishes to thank the incomparable Lady Gaga whose amazing courage deployed technology to advance creativity and commercial innovation in pandemic. Thanks to Emalyn Levy Feitshans, and Dr. Jay Levy Feitshans Esq for advancing public health efforts globally; and to members of the USA National Institute of Occupational Health and Safety (NIOSH) Dr John Howard, Director and Dr Mark Hoover. Dominique Charoy, muse and enabler for complex juridical thinking. This article is written in memory of Jack Levy.Esq, Sylvia Feelus Levy and John Lennon who had the vision to Imagine the world will be one.

Submetido em: 02/03/21
Aprovado em: 09/03/21

Como citar este artigo

Feitshans I. New law preventing COVID-19: the first effort to prevent occupational transmission of disease of the 21st century in the USA. Cadernos Ibero-Americanos de Direito Sanitário. 2021 abr./jun.;10(2):295-306.

<https://doi.org/10.17566/ciads.v10i2.771>