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ILLINOIS PUBLIC EMPLOYEE RELATIONS REPORT

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The Illinois Public Employee Relations Report provides current, nonadversarial information to those involved or interested in employer-employee relations in public employment. The authors of bylined articles are responsible for the contents and for the opinions and conclusions expressed. Readers are encouraged to submit comments on the contents, and to contribute information on developments in public agencies or public-sector labor relations. The Illinois Institute of Technology and the University of Illinois at Urbana-Champaign are affirmative action/equal opportunities institutions.

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BARGAINING IN THE TIME OF COVID: HOW COLLECTIVE BARGAINING IMPACTS SCHOOLS AND THEIR MITIGATION STRATEGIES

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I. INTRODUCTION

Keeping schools and school communities safe became the central and unprecedented focus of school boards and school administrators as the COVID-19 pandemic took hold in Illinois in the winter of 2020. Since then, board members and superintendents have devoted most of their time to implementing public health guidance with the goal of educating students safely. In this work, they have weathered changing public health guidance, delayed and often murky directives from state education officials, parent anger and protests, mandates and court orders, student mental health issues and learning loss, and the crushing responsibility of deciding when and how to reopen school buildings in the face of a deadly global pandemic.

While school officials have a unique responsibility for their students, keeping school personnel healthy, safe, and employed has also been a responsibility that has rested on their shoulders. For the 2020-2021 school year, in large part, unions and administrators worked together, through the collective bargaining process, to develop mitigation measures designed to keep school communities safe and to provide leave protections for school personnel. Tensions flared in some places when the interests of bringing students back into school buildings clashed with the safety concerns of staff. In these instances, the single-focused concerns of unions often chafed at school administrators who had to balance the entire panoply of concerns within the school community.

The next school year, 2021–2022, brought different tensions, with school officials and school personnel often aligned against parents and other stakeholders who sought a lessening of the mitigation measures that had kept students safe at school.

The unprecedented nature of this pandemic and the resulting chaos it produced in schools cannot be overstated. It is therefore not surprising that traditional frameworks of labor/management relationships and bargaining often did not result in smooth resolution or agreement on how to keep schools safe. More unexpected is that it did work in many places. Indeed, while negotiating mitigation measures was time consuming, at times contentious and stressful, ultimately schools did reopen safely.

Even where it did not work without legal intervention, relationships have largely calmed as this acute phase of the pandemic has passed and routine has returned to school buildings. The long-term impact on labor relations, however, is yet to be determined. This paper reviews the changing bargaining issues that school districts and teacher unions confronted and the tensions that strained the labor-management relationship.

II. The Beginning of the Pandemic

A. The Educational Landscape in the Spring and Fall of 2020

In March of 2020, upon issuance of Governor Pritzker's disaster proclamation and his Executive Order closing schools, school districts throughout Illinois shut down in-person instruction and moved to remote learning.[1] While some districts had implemented limited e-learning plans to use in the event of inclement weather, no school district in the state was prepared to provide robust remote instruction for more than a few days. As the pandemic took hold in the late winter and spring of 2020, remote learning encompassed everything from teachers conducting daily live instruction through online platforms to weekly packets of worksheets that parents picked up from tables outside of school buildings.

While the prevailing narrative at that time was how limited and disorganized instruction was for students, lost in that story is the extraordinary lengths school administrators went to keep their school communities connected. In this they were joined by the dedication of custodial workers who came into buildings to clean, teachers who spent hours creating lessons in new modalities, and support staff who reached out to families and assisted in ensuring at-risk students were fed. There were, to be sure, teachers and staff who took advantage of the remote environment to avoid work duties[2], but the overwhelming majority of school personnel worked diligently to keep students engaged and families connected. In this they were supported by school administrators and school boards also working to keep districts running, untethered from the daily routine of the school building.

As the summer of 2020 began, state officials pushed school districts to plan for reopening in the fall.[3] Most districts began planning a return to in-person learning. In some districts, this resulted in collaborative discussions with teacher and support staff unions. In other districts, the discussions between union and administration grew contentious. Having previously strong labor management relationships did not necessarily prevent districts from dissolving into acrimonious disputes with their unions. At one such table, a union president memorably told a superintendent that, if he chose to reopen the district, he would be personally responsible for the death of any staff member.

These labor management discussions were set in a larger arena of shifting public health guidance, community calls to reopen schools, uncertainty about the trajectory of the virus, and intense pressure from school board members to chart a safe path to in-person

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[1] Ill. Exec. Order No. 2020-05 (Mar. 13, 2020), https://www.illinois.gov/government/executive-orders/executive-order.executive-order-number-5.2020.html.

[2] In one extraordinary case, in the spring of 2020 a teacher maintained full-time employment in two school districts simultaneously during remote learning and was paid a full-time salary from both districts. When this was discovered, one of the districts sued the teacher for fraud and prevailed. Board of Education of Matteson School District 62 v. Parker, 20 M1 123782.

[3] ILL. ST. BD. OF EDUC. & ILL. DEP'T. OF PUB. HEALTH, STARTING THE 2021–21 SCHOOL YEAR PART 3 — TRANSITION JOINT GUIDANCE, https://www.isbe.net/Documents/Part-3-Transition-Planning-Phase-4.pdf.

learning. Administrators, charged with making consequential health decisions in the middle of these competing pressures, found themselves in an impossible position. As the number of COVID infections began to rise again in the fall, the result, often dictated by district resources, size, infrastructure and community demographics, was a patchwork of in-person, hybrid, and fully remote instructional plans across the state.[4]

B. Bargaining Mitigation Measures

The focus of bargaining in the summer and fall of 2020 centered primarily around mitigation strategies, with the union and administration negotiating about personal protective equipment (PPE), social distancing, testing, ventilation, cleaning, and other health and safety protocols. Many of these discussions ended in agreement codified in memoranda of agreement or understanding. Where agreement was not reached, the disputes generally centered around the union's belief that it was unsafe to return to any in-person learning and a union's right to prevent the reopening until agreement had been reached.

While most school districts agreed to bargain the impact of their reopening plans with their unions, they also asserted that the decision on how and when to reopen schools is an inherent managerial decision. An educational employer's inherent managerial authority stems from Section 4 of the Illinois Education Labor Relations Act (IELRA) which states: "Employers shall not be required to bargain over matters of inherent managerial policy, which shall include such areas of discretion or policy as the functions of the employer, standards of services, . . . and direction of employees."[5] This provision of the IELRA is often mirrored in collective bargaining agreements.

The decision as to whether a school building is opened for students and whether teachers will be required to work on site is a matter of inherent managerial authority.[6] Further, school boards generally do not have a duty to bargain over how they direct employees (i.e., the ability to require its employees to report to their assigned schools in order to accomplish necessary functions to educate students).[7] As the pandemic continued, districts were required to weigh a myriad of competing issues to determine when and how to return students to the classroom. Because this decision is an inherent managerial right, the benefits that such bargaining over the decision would have on the District's decision-making process are balanced against the burdens that bargaining would impose on the District's managerial and decision-making process.[8] The balance favors an employer's unilateral authority when the employer's decision concerns policy matters that are intimately connected to its governmental mission or where bargaining would sharply

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[4] Robert Bruno and Nicholas Christen, *Educating During A Pandemic: The Role of Collective Bargaining in Going Back to School*, ILL. PUB. EMP. RELATIONS REPORT, 38, (Winter) 2021: 3-34.
[5] 115 ILCS § 5/4.
[6] Boston Teachers Union v. Martin, et al., 2084-2324-C, p.12 (Comm. of Mass.) (October 14, 2020) (the court recognized "the customary management right to determine when teachers will and will not be required to work on-site.").
[7] See, e.g., Sherrard Cmty. Unit Sch. Dist. 200 & Sherrard Educ. Ass'n, IEA-NEA, 13 PERI ¶ 1003 (IELRB Oct. 28, 1996) (holding that that employer's decision not to transfer a teacher to a different work location was a matter of inherent managerial policy and thus not a subject of mandatory bargaining).
[8] Cmty. College Dist. 508 (City Colleges of Chicago), 13 PERI ¶ 1045 (IELRB Mar. 7, 1997).

diminish its ability to effectively perform the services it is obligated to provide.[9] The labor boards and reviewing courts also consider whether the employer has any special need for speed or flexibility in making certain policy decisions when determining this balance of interests.[10]

In the summer and fall of 2020, districts needed to consider information provided by public health officials, with the very real educational, social-emotional, and safety impact that being out of schools had and continued to have on students, and the impact on parents, particularly the economic impact, as students remained out of school. There is no more obvious managerial function, because it requires weighing a number of competing interests: those of the teachers and staff; of the students and their parents; and of society at large. In stark contrast, unions had only one interest: that of their members. In the ULPs filed by unions during the pandemic, rarely if ever were students even mentioned and, generally, only the interests of members were raised while negotiating mitigation issues.[11]

Having to bargain the decision to reopen with unions impacted districts' ability to weigh all these factors and to make decisions with the speed and flexibility needed as conditions on the ground changed. Thus, districts took the position that while unions may have had a right to demand to bargain over the health and safety impact of reopening decisions, unions had no right to bargain the decision to return to in-person instruction itself.

C. The Intervention of the Illinois Education Labor Relations Board

In a handful of districts, this dispute over the duty to negotiate the decision to return to in-person instruction escalated and resulted in unions filing Unfair Labor Practice charges with the Illinois Educational Labor Relations Board and seeking the extraordinary remedy of immediate injunctive relief. In the first of these cases, Western Illinois University (WIU) had announced a return to in-person instruction and one of the university's labor unions alleged that it had not bargained that decision in good faith.[12] The Union asserted that requiring employees to be physically present for face-to-face instruction during the pandemic was a mandatory subject of bargaining because it is a health and safety issue. Section 14(a)(5) of the Illinois Educational Labor Relations Act prohibits an employer from refusing to bargain in good faith, and an employer violates the Act when it unilaterally changes mandatory subjects without bargaining in good faith to impasse.[13] For the first time, and relying on similar holdings by the National Labor Relations Board and the Illinois Labor Relations Board, the Illinois Education Labor Relations Board (IELRB) in granting the requested injunctive relief held that there was

[9] Chief Judge of the Circuit Court of Cook Cnty., 31 PERI ¶ 114 (IELRB SP Dec. 31, 2014), citing Vill. of Franklin Park, 8 PERI ¶ 2039 (IL SLRB Aug. 13, 1992) ("the scope of bargaining in the public sector must be determined with regard to the employer's statutory mission as well as the nature of the public service it provides.").
[10] See, e.g., Chicago Park Dist. v. Ill. Lab. Relations Bd., Local Panel and Serv. Employees Int'l Union, Local 73, 354 Ill. App. 3d 595, 604 (1st Dist. 2004).
[11] See, e.g., Charge, Chicago Teachers Union v. Chicago Bd. of Educ., Case No. 202 l-CA-0043 (Oct. 23, 2020).
[12] W. Ill. Univ and UPI, Local 4100, IFT-AFT, Case No. 2021-CA-0009-C (IELRB Sept. 17, 2020).
[13] Vienna Sch. Dist. No. 55 v. Ill. Educ. Labor Relations Bd., 162 Ill. App. 3d 503, 507 (4th Dist. 1987).

good cause to believe that the WIU Union would succeed in its argument that the decision to return to in-person instruction, as a health and safety issue, was a mandatory subject of bargaining. WIU was enjoined from resuming in-person instruction until it had bargained its decision to reopen with its labor unions. The IELRB went on to repeat this holding in subsequent cases regarding K-12 districts.[14]

Unions did not prevail in obtaining injunctions in all cases brought to the IELRB. In the cases in which the unions lost, the IELRB found that facts were in dispute over whether a demand to bargain had been made in a timely manner and whether the administration had then engaged in good faith bargaining.[15]

The IELRB's determination that the decision to reopen schools (or chose a hybrid reopening plan) was subject to good faith bargaining because it directly implicates safety and health presented a number of challenges to school districts. First, the IELRB did not define what health and safety encompassed nor did it provide clear guidance on what good faith bargaining would mean regarding these decisions. With the course of the virus changing and new mitigation measures, like vaccines, on the horizon, the IELRB's decision impeded districts' ability to pivot and change reopening plans without protracted negotiations with their unions. Some unions delayed meetings or asked for meeting after meeting, essentially holding the district and its reopening plans hostage until resolution was reached.[16] Most concerning, by providing unions the right to bargain, the IELRB decision prevented administrators and school boards from weighing the concerns and needs of parents and students as heavily as those of the teachers and staff.

D. The Safety of Schools, Reopening and Labor Conflict

The union push for bargaining over health and safety and the decision to reopen was motivated by the very real fear of educators about the virus. There is no doubt that the potential illness of members motivated union leaders to push back hard on the reopening of school buildings. Unfortunately, often lost in these conversations was the real and detrimental impact on students of being out of school buildings, particularly students who were most at risk—low-income students and students with disabilities.

The real question in the 2020–2021 school year was how safe school buildings were and how significant the health risk was in reopening. Many public health officials, including those in Chicago, confirmed that with layered mitigation strategies in place, schools were not places of high transmission. Indeed, in Chicago, by December, it was clear from the

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[14] W. Suburban Fed'n of Techers, Local 571, IFT-AFT and Proviso Twp. High Sch. Dist. 209, Case No. 2021-CA-0041-C (IELRB Nov. 5, 2020); Cicero Sch. Dist. No. 99 and Cicero Council, West Suburban Teachers Union, Local 571, IFT-AFT, Case No. 2021-CA-0051-C (IELRB Jan. 21, 2021). Following the initial rulings on injunctive relief, these matters often were resolved through bargaining.
[15] Elmhurst Cmty. Unit Sch. Dist. No.205 and Elmhurst Paraprofessional and Sch. Related Personnel Council, Local 571, IFT-AFT, Case Nos. 2021-CA-0049-C and 2021-CA-0050-C (IELRB Feb. 19, 2021); Chicago Teachers Union, Local No. 1, IFT-AFT and Chicago Bd. of Educ., Case Nos. 2021-CA-0014-C, 2021-CA-0043-C; Mahomet-Seymour Educ. Ass'n., IEA-NEA and Mahomet-Seymour Comty. Unit Sch. Dist. No. 3, 2021-CA-0047-C.
[16] See, e.g., Dist. Position Statement, Mahomet-Seymour Educ. Ass'n., IEA-NEA and Mahomet-Seymour Cmty. Unit Sch. Dist. No. 3, 2021-CA-0047-C.

reopening of schools run by the Archdiocese of Chicago that in classrooms there was a lower rate of infection for children than in the community at large. Rates of infection among staff at those schools were also low. Indeed, by mid school year, a national and international consensus had emerged that schools were not a significant source of spread and that the public health risks of having children at home in general outweighed the risk of having teachers and students at school when proper precautions were taken.[17] Even national teacher union leadership recognized that opening, particularly in the primary grades, could be done safely.[18]

Moreover, whether it was appropriate to reopen schools was not a binary decision that could be answered with a simple yes or no based on a set of public health metrics. In balance also was the very real educational impact of remote learning on districts' most vulnerable students; students who were the least engaged, not being served at a level they deserved by remote learning, and who stood to gain the most from in-person instruction. School districts needed to balance the interests of the students they were charged with serving with those of employees, even if from the perspective of school boards, unions refused to do so. Many unions made clear that they wanted members to stay home until the pandemic had finally ended, regardless of the science, and regardless of the very real harm that school districts believed it was doing to students and their parents.

On November 29, 2020, the nation's leading COVID-19 health expert, Dr. Anthony Fauci, the director of the National Institute of Allergy and Infectious Diseases, stated on ABC's *This Week* that the country should "close bars and keep the schools open."[19] Recognizing that the spread of COVID-19 by children had not occurred in large numbers, he urged the country's default position be to "keep the children in school, or to get them back to school."[20]

What federal and state officials recognized was that spread of COVID-19 was not occurring in high numbers in schools, keeping the health risk of reopening to students and teachers low, while, in contrast, the educational and health risks to students in continuing remote learning were profound and a public health crisis in and of themselves. In balance were the very real and very devastating short-term and long-term effects of the closure of schools on children, effects that unions, at the table and in their briefings to the IELRB, largely ignored.

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[17] Sharif A. Ismail et al., *SARS-COV-2 Infection and Transmission in Educational Settings: A Prospective, Cross-Sectional Analysis of Infection Clusters and Outbreaks in England*, THE LANCET (December 8, 2020), https://www.thelancet.com/journals/laninf/article/PIIS1473-3099(20)30882-3/fulltext; Eliza Shapiro et al., *Why School Districts Are Bringing Back Younger Children First*, N.Y. TIMES (Nov. 30, 2020), https://www.nytimes.com/2020/11/30/nyregion/elementary-schools-reopening.html?auth=login-email&campaign_id=174&emc=edit_csb_20201209&instance_id=24861&login=email&nl=coronavirus-schools-briefing®i_id=74820942&searchResultPosition=2&segment_id=46470&te=1&user_id=930ec71fab70f76b7e2aa3a906915f63.

[18] Randi Weingarten (@rweingarten), Twitter (Nov. 29, 2020, 12:01 p.m.) https://twitter.com/rweingarten/status/1333108815412269057.

[19] This Week (@ThisWeekABC), Twitter (Nov. 29, 2020, 8:43 a.m.) https://twitter.com/ThisWeekABC/status/1333059043414433796?refsrc=twsrc%5Etfw.

[20] *Id.*

School closures reduced expected student learning gains, which has lifelong consequences and exacerbates educational and economic inequalities. Greater learning loss on the part of Black, Hispanic, and low-income students had the potential to widen the existing educational achievement gap, as well as lead to an increase in the high school drop-out rate. A study conducted by McKinsey in June of 2020 predicted significant risk of learning loss the longer schools remain closed, with the most significant learning loss among low-income, Black, and Hispanic students.[21] Missed instruction had been found to lead to a decrease in final educational attainment which, in turn, had a direct impact on life expectancy.[22] This delayed growth in learning has now been confirmed, with school districts scrambling to add tutors, longer hours, and other supports and resources to bring students back to grade-level expectations—with students having lost the equivalent of months of learning during the 2019–2020 and 2020–2021 school years.[23]

Beyond learning loss, McKinsey predicted an increase in the number of high school students who would drop out as a result of COVID and associated school closures. These concerns raised by McKinsey were echoed by others, including the American Academy of Pediatrics.[24] Even the New York Times, while acknowledging the apparent good news of some learning growth on national standardized testing, recognized that the results did not account for the 25% of students who had been enrolled and tested in the prior two years but were not tested during the 2020–2021 school year; these missing students were disproportionately minority and lower-achieving students. Again, studies following the 2020–2021 school year confirmed significantly increased rates of absenteeism that portends likely increases in permanent disengagement from school.[25]

Many districts prioritized the return of the youngest students and students with significant disabilities, both groups for whom remote instruction was the most difficult to deliver and the least effective. It is widely recognized that attendance in quality preschool programs has profound and lasting impact, not only on a student's educational achievement but also on long-term health,[26] career and economic stability,[27] and a

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[21] Emma Dorn et al., *COVID-19 and Student Learning in the United States: The Hurt Could Last a Lifetime*, McKinsey & Co. (June 1, 2020), https://www.mckinsey.com/industries/public-and-social-sector/our-insights/covid-19-and-student-learning-in-the-united-states-the-hurt-could-last-a-lifetime#.

[22] Dimitri A. Christakis et al., *Estimation of US Children's Educational Attainment and Years of Life Lost Associated with Primary School Closures During the Coronavirus Disease 2019 Pandemic*, JAMA Network Open (Nov. 12, 2020).

[23] Emma Dorn et al., *COVID-19 and Education: The Lingering Effects of Unfinished Learning*, McKinsey & Co. (July 27, 2021), https://www.mckinsey.com/industries/education/our-insights/covid-19-and-education-the-lingering-effects-of-unfinished-learning; Emma Dorn et al., *COVID-19 and Education: An Emerging K-shaped Recovery*, McKinsey & Co., (Dec. 14, 2021), https://www.mckinsey.com/industries/education/our-insights/covid-19-and-education-an-emerging-k-shaped-recovery.

[24] Am. Acad. of Pediatrics, COVID-19 Planning Considerations: Guidance for School Re-Entry, (Aug. 19, 2020), https://services.aap.org/en/pages/2019-novel-coronavirus-covid-19-infections/clinical-guidance/covid-19-planning-considerations-return-to-in-person-education-in-schools/.

[25] Dorn, *supra* note 23.

[26] Ctr. for Disease Control, Early Childhood Education (Aug. 5, 2016), https://www.cdc.gov/policy/hst/hi5/earlychildhoodeducation/index.html.

[27] The Carolina Abecedarian Project, Groundbreaking Follow-up Studies, July 13, 2022, http://abc.fpg.unc.edu/follow-up-studies/.

reduction in the likelihood to be involved in crime.[28] While efforts were being made to provide remote learning to pre-kindergartners, no online programs could provide access to quality programming that was equivalent to in-person learning.[29] Likewise, students with special education needs faced significant obstacles when attempting to learn in a remote environment. And, the studies that had been conducted on primary school-age children made clear that distance learning was not effective for many of these students.

Beyond learning implications, in balance was the health and safety of students, many of whom were dependent on being in-person for not only the education program, but also for a safe space, food, and extensive services, including mental health services. Early in the pandemic, a UNICEF report raised awareness that children were at greater risk of abuse, neglect, exploitation, and violence due to lockdown measures.[30] Even for students who were not at risk for these serious safety issues, studies showed that students were increasingly sedentary the longer schools were closed, suggesting that prolonged school closures, and the lack of access to physical education classes, outdoor spaces, and food security for students who relied on school meals, might result in weight gain.[31] Childhood weight gain and physical activity track into adulthood, resulting in lifelong health implications.

With the closure of schools, the loss of supportive adult and peer relationships had also taken a profound toll on the mental health of young people.[32] Starting during the spring 2020 school closures, students began experiencing significant rates of depression and anxiety, not only about the health of their family and friends due to the coronavirus, but also related to economic uncertainties from the unemployment of parents, academic struggles, and isolation.[33] Being separated from schools, apart from ready access to school-based mental health personnel, had negatively impacted the likelihood that students received the resources needed to combat these struggles.[34] For students already suffering from mental health issues, the loss of resources, support, and a daily routine had the risk of triggering a relapse of more significant symptoms of their illnesses.[35]

It was to address these risks that the Illinois State Board of Education (ISBE), in its guidance to schools for the 2020–2021 school year, urged "schools and districts to plan

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[28] Libby Nelson, *The Biggest Benefit of Pre-K Might Not Be Education*, VOX (July 30, 2014), https://www.vox.com/2014/7/30/5952739/the-research-on-how-pre-k-could-reduce-crime.

[29] Rhian Evans Allvin, *Making Connections. There's No Such Thing as Online Preschool*, NAEYC (Mar. 2020), http://www.naeyc.org/resources/pubs/yc/mar2020/theres-no-such-thing-online-preschool.

[30] Unicef, COVID-19: Children at Heightened Risk of Abuse, Neglect, Exploitation and Violence Amidst Intensifying Containment Measures (Mar. 20, 2020), https://www.unicef.org/press-releases/covid-19-children-heightened-risk-abuse-neglect-exploitation-and-violence-amidst.

[31] Am. Acad. of Pediatrics, *supra* note 24.

[32] Laura Castaneda, *Negative Impacts During a COVID-19 Pandemic on Children, Adolescents & Families*, HEALTH SCI. J. (Oct. 12, 2020).

[33] Carolyn Jones, *Student Anxiety, Depression Increasing During School Closures, Survey Finds*, EDSOURCE (May 13, 2020), https://edsource.org/2020/student-anxiety-depression-increasing-during-school-closures-survey-finds/631224.

[34] *Id.*

[35] Joyce Lee, *Mental Health Effects of School Closures During COVID-19*, THE LANCET (June 1, 2020), https://www.thelancet.com/journals/lanchi/article/PIIS2352-4642(20)30109-7/fulltext.

for and implement the transition to in-person instruction through the lens of equity."[36] ISBE stressed that the collective responsibility of the state, districts, teachers, and parents had never been more critical:

> with the COVID-19 pandemic exacerbating economic inequalities, heightening the digital divide, and worsening conditions for students whose mental and physical health and safety was already at risk. The brutal death of George Floyd and the days of nationwide protests in its wake call upon us as educators to recommit to eliminating all forms of racism in our school policies. We must be available and open to hearing students' concerns.[37]

In the face of these extraordinary impacts on students, unions continued to bargain hard over reopening, seemingly determined to override the input of all other stakeholders—parents, communities, other staff, and state and local governments—and ignore the devastating impacts that school closures had on students, so that only their opinion mattered on whether schools reopened. It is understandable in the face of illness and death that unions urged caution. It was difficult to weigh the immediate costs of a pandemic against the long-term impacts remote instruction would have on children but that is what districts had to do. It was school officials that had the responsibility to balance all of the competing concerns, listen to the guidance of public health officials, and take the necessary mitigation steps to return students to the school building. To reopen schools, administrators and school boards had to consider education policy, public health policy, economic policy, and emergency management policy. These decisions were entrusted to public officials, who were in a position to be responsive and address the needs of all stakeholders, including families and students.

II. YEAR TWO OF THE PANDEMIC

A. The Mitigation Landscape During the 2020–2021 School Year

The 2020–2021 school year brought conflict and dissension between school officials and unions, but it also brought vaccination and improvement in overall COVID transmission numbers. As the summer of 2021 began, districts, relying on experiences of partial or full re-openings in the spring of 2021, planned for a full reopening for the upcoming 2021–2022 school year. There was notably less conflict between labor and management as the mitigation measures had proved largely reliable as schools reopened the prior year and adults now had the added protection of vaccination. When conflict arose that summer, it was largely from parent communities who were chafing at district-imposed mitigation measures, most notably mandatory mask wearing in school buildings and the exclusion of students who had been in close contact with someone who tested positive for COVID.

Intervening into this conflict, and perhaps recognizing the resulting patchwork of mitigation measures across the state, on August 26, 2021, Governor Pritzker imposed an indoor masking requirement in schools and a vaccination/testing requirement for all

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[36] ILL. ST. BD. OF EDUC. & ILL. DEPT. OF PUB. HEALTH, *supra* note 3.
[37] *Id.*

school personnel.[38] Then on September 17, 2021, the Governor issued an executive order requiring schools to exclude students and staff who tested positive for COVID and to exclude unvaccinated students and staff who were close contacts with a person who tested positive for COVID.[39] These orders were amended and extended multiple times until the Governor removed the masking mandate on February 28, 2022[40] and amended the exclusion protocols for schools.[41] The staff vaccination/testing requirement remains in effect.[42] These executive orders took the decisions regarding mitigation measures largely out of the hands of local school officials. As first the Delta variant and later the Omicron variant surged, the mitigation measures in schools, both those mandated by the state and those imposed by districts at the local level, allowed schools to remain open and safe.

The relative calm of the fall of 2021 was broken as winter recess approached and predictions of massive infection rates in January became widespread. Unions, most notably the Chicago Teachers Union, believed it was unsafe to return and sought temporary closures for when school returned in January. At the same time, the state mandates, particularly the masking requirement, became a flash point across the state, with parents staging protests and even some school board members calling for the Governor to rescind his orders. Ultimately, hundreds of parents across the state filed a lawsuit against over a hundred and fifty school districts seeking to strike down the masking mandate and the requirement to exclude close contacts.[43] A smaller suit was filed seeking to remove the vaccine/testing requirement for school personnel.[44] In that fight, the districts and the unions found themselves on the same side, seeking to preserve local control over the health measures implemented to keep school communities safe. The resulting temporary restraining order entered in that case, although ultimately vacated by the Appellate Court, whose order was then sustained by the Illinois Supreme Court, sent school districts across the state into flux. The result was a shift in most districts away from imposed masking to mask optional guidelines. Likewise, most districts stopped or significantly limited the exclusion of close contacts. The easing of these restrictions, while perhaps hastened in some districts by the legal action, was the result of an overall significant decrease in the transmission of COVID throughout the state.

[38] Ill. Exec. Order No. 2021-20 (Aug. 26, 2021), https://www.illinois.gov/government/executive-orders/executive-order.executive-order-number-20.2021.html.
[39] Ill. Exec. Order No. 2021-24 (Sept. 17, 2021), https://www.illinois.gov/government/executive-orders/executive-order.executive-order-number-24.2021.html.
[40] Ill. Exec. Order No. 2022-06 (Feb. 28, 2022), https://www.illinois.gov/government/executive-orders/executive-order.executive-order-number-06.2022.html.
[41] Ill. Exec. Order 2022-03 (Jan. 11, 2022), https://www.illinois.gov/government/executive-orders/executive-order.executive-order-number-03.2022.html.
[42] Ill. Exec. Order 2022-10 (Apr. 01, 2022), https://www.illinois.gov/government/executive-orders/executive-order.executive-order-number-10.2022.html.
[43] Austin et al. v. The Bd. of Educ. of Cmty. Unit Sch.Dist.#300, 2022 IL App (4th) 220090-U, ¶ 1, appeal denied. Multiple pending cases were consolidated into this case. Smaller cases against individual districts were also filed across the state.
[44] Allen et al. v. The Bd. of Educ. of North Mac Cmty. Unit Sch. Dist. No.34, 2022 IL App (4th) 220307-U, ¶ 1.

B. Bargaining Mitigation Measures

As most districts began the 2021–2022 school year with solid reopening plans, reflecting strong local mitigation measures and adherence to the Governor's state imposed mandates, the focus on bargaining was generally on providing leave for staff who were excluded from the school building because they tested positive for COVID or had to care for a child who was excluded from school.[45] This bargaining was generally amicable and resulted in memoranda of agreement. Both districts and unions prioritized vaccinated staff in these agreements, hoping to support further vaccination among school personnel.[46]

The most notable exception to these limited negotiations was the Chicago Teachers Union (CTU), which demanded ongoing bargaining over COVID mitigation measures. The CTU pushed for metrics to close individual schools and the entire district, more social distancing, mandatory vaccination, CPS-provided vaccination clinics, mandatory student testing along with robust testing within schools, extensive contact tracing measures, leave for staff with underlying conditions and a myriad of other measures. Given consistent infection rates in Chicago, CTU's insistence on robust mitigation measures to protect their members was understandable. Unfortunately, the CTU often ignored the advice and guidance of public health officials or legal obstacles,[47] instead insisting on codifying requirements seemingly driven more by fear than by science. The dispute between CTU and CPS ultimately culminated in a CTU work stoppage in January of 2022 when CTU members refused to return after the winter recess. Schools were open, students were scheduled to be in class, and teachers did not report to work. The idea that teachers could dictate that the district move to remote learning as a way to argue this was not an unlawful strike has no basis in law. Indeed, the CTU itself referred to the action as a strike in one of its slide presentations[48] and members were threatened if they did not participate in the work action.[49] The matter was ultimately resolved, but students lost five days of instruction from the work stoppage.

IV. CONCLUSION

Just as there was no existing framework for schools to operate during a global pandemic, labor negotiations on mitigation measures were on new terrain. In some places, unions and school officials have navigated through this work collaboratively and created health

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[45] During the 2020-2021 school year, school personnel benefited from paid leave days provided for under the Families First Coronavirus Response Act. By the beginning of the 2021-2022 school year, such leave had expired so unions negotiated for leave at the local level.

[46] These memoranda were largely superseded by P.A.102-0697, signed by Governor Pritzker on April 5, 2022, and becoming effective on that date. The law provides for leave for vaccinated staff who contract COVID or have a child who is excluded from school and also provides for the recoupment of sick leave days and payment for unpaid leave days for COVID-related absences over the prior two school years.

[47] For example, CTU sought closure of entire school buildings, though public health officials believed cases could be contained by targeted exclusions of exposed individuals. And CTU wanted "opt-out" for student testing even in the face of CPS' continued insistence that it could not legally perform medical testing on minors without affirmative parental consent.

[48] Chicago Teachers Union, PowerPoint Presentation (on file with author).

[49] Chicago Teachers Union, Letter to Members (on file with author).

and safety plans that guided districts through the past two school years. In other places, negotiations were marked by contentiousness resulting in legal action and delays in students returning to school buildings. In all districts, plans were ultimately put in place, and schools have reopened. While the school year, 2021–2022 was marked with more upheaval and protest around masking and other mitigation measures, unions and school administrators found themselves more united in the ongoing efforts to keep school buildings safe. Unfortunately, damage to union management relationships did occur. Repair will not happen overnight. Both labor and management need to be committed to normalizing relationships. Many districts have successfully engaged in interest-based bargaining in the wake of COVID negotiations to reset norms and expectations for discussion and to confirm commitment to the same goal of good working relationships. Others have rebuilt relationships slowly, tackling smaller issues to regain joint problem-solving momentum. Ultimately, repair may simply take time and the rebuilding of trust.

FIGHTING FOR THE LIVING

By Stephen A. Yokich

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I. BACKGROUND

The COVID-19 pandemic laid bare many of the deep structural injustices of our society and economic system. It demonstrated the consequences of decades of public policies that have starved government agencies of the funds they need for both their infrastructure and to carry out the task of protecting occupational and public health, and the hazards of political oversight of those agencies. It revealed the limits of what even well-meaning public and political leaders are willing and able to do to protect the common good.

Nowhere have these issues been more apparent than in the need to protect workplaces from becoming vectors of disease and death. Occupational health and safety cannot be left to individual employers or employees. Both are subject to competitive pressures: employers to pressures from competitors who seek the cost advantages that accrue from maintaining substandard conditions and employees who are unable or unwilling to speak up about safety conditions because they fear that they might lose their livelihoods.[11] Public regulation is required in order to ensure that measures are based upon the best possible interpretation of the science involved, to set the minimum standards that all employers must meet, and to ensure that safety measures adequately protect employees. Public regulation entails a transparent assessment of the risks of a particular hazard, the short-term measures necessary to reduce those risks and the longer-term measures that are required as well.

There is much evidence that COVID-19 spreads due to workplace exposures.[2] Employees often work in close proximity to others for extended periods of time. There is no national policy regard sick leave which replaces income lost when employees are sick. Employees have little control over who they come in contact with during the workday and have little control over the design of their workplaces or the ventilation in those workplaces.

Meaningful public regulation of workplace conditions was largely absent during the first year of the pandemic. In 2021, a new administration in Washington, D.C. raised hopes that a public assessment of the risks of, and proper safety measures to reduce, occupational exposure to disease might be undertaken by the Occupational Safety and Health Administration and result in scientifically-based regulation to protect workers and

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[1]Additionally, in the public sector, political and budgetary considerations often prevent officials and administrators from properly maintaining safety conditions in the workplace.

[2] Yea-Hung Chen et al., *Covid-19 Mortality among Working-Age Americans in 46 States, by Industry and Occupation*, (Apr. 18, 2022), https://www.medrxiv.org/content/10.1101/2022.03.29.22273085v2.full-text; Elizabeth B. Pathak et al., *Joint Effects of Socioeconomic Position, Race/Ethnicity, and Gender on Covid-19 Mortality among Working-Age Adults in the United States*, 19 INT'L J. OF ENVTL. RES. & PUB. HEALTH 5479 (2022).

their families. This hope has been dashed by the same political, economic, and social polarization that prevents action on many other pressing policy issues facing our nation.

Without meaningful and comprehensive public regulation, employees facing dangerous conditions must fend for themselves. Some groups of employees have effectively used legal and organizational strategies to force employers to implement safety measures. Other groups were not able to do so, with tragic consequences for workers and their families. This article traces a few of those struggles and analyzes what worked and what did not. Since it is highly unlikely that the pandemic is now "over," some of the strategies may assist other groups of workers as they face this evolving hazard.

A comprehensive description of the struggle to maintain safe workplaces during the pandemic is beyond the scope of this article. An article written by a labor lawyer for hospital workers would be very different from this one. However, two principles are constant. First, strong administrative regulation and enforcement is an essential part of ensuring workplace safety. Second, employees with economic power stand a much better chance to ensure the safety of their work. This power may come from economic leverage, from collective organization (usually through a union), or both. When both are aligned, workplaces are safer.

This article will examine how these principles applied during three different "phases" of the pandemic: 1) Phase I, which involved the need to identify and protect essential workers; 2) Phase II, which involved the protection of employees returning to in-person work; and 3) Phase III, which has involved the consequences of the decision to make employment the central focus of vaccination policy.

II. PANDEMIC PHASE I: THE FAILURE OF ADMINISTRATIVE REGULATION TO PROTECT WORKERS

The pandemic had spread widely before state and federal political leaders decided that strong action was necessary to protect public health. Consequently, state, and national "stay at home orders" were the key national response to the spread of disease in March and April of 2020.

From the standpoint of labor, "stay-at-home" orders present a double-edged sword. The "safety net" in the United States is one that has many holes, and its infrastructure is poorly maintained.[3] Staying at home thus presents severe economic consequences for many workers. On the other hand, the coronavirus spreads primarily by aerosol contact (by breathing), which means that involuntary exposure to other people in the community in indoor workplaces for long periods inevitably drives up the risk of infection by disease. Thus, decisions regarding the definition of "essential workers" had tremendous

[3] An extensive discussion of the "holes" in the "safety net" of the United States is well beyond the scope of this article. The prime "safety net" for able bodied workers is the 50-state system of unemployment insurance. Coverage, eligibility requirements, and benefits vary enormously between states. So do the resources dedicated to the infrastructure of the state agencies that process claims. No state has benefits that wholly replace the income from work. Likewise, the ability of unemployed workers to procure health insurance for themselves and their families varies significantly between States.

consequences. Millions of poorly paid service workers, for example, were instructed that they were "essential" and told that they had to work for the good of the country. The decisions regarding the definition of essential were not transparently made and were made by political leaders and officials at the national, state, and local levels. There was no public assessment of the risk to the workers involved or of the amount of risk that was justified for the different categories of essential workers.

The primary federal agency charged with the assessment and reduction of occupational injury and disease is the Occupational Safety and Health Administration ("OSHA"). OSHA has a unique structure for a national labor law: a state can create a "state plan" to administer its occupational injury and disease program so long as the state plan is "at least as effective" as the federal statute.[4]

Congress enacted the Occupational Safety and Health Act ("the OSH Act") in 1970.[5] The purpose of the statute was to protect workers from dangerous conditions in their workplaces. Accordingly, the policy of the OSH Act is "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions."[6] The Act requires the agency, "in promulgating standards dealing with toxic materials or harmful physical agents" to set standards "to the extent feasible" to assure that "no employee will suffer material impairment of health or functional capacity" even if the employee has regular exposure to the hazard for their entire working life.[7]

In addition to requiring employers to comply with the occupational safety and health standards promulgated under the Act, the "general duty clause" of the OSH Act requires employers to "furnish to each of his employees employment and a place of employment … free from recognized hazards that cause or are likely to cause death or serious physical harm."[8] The general duty clause requires that preventable hazards must "be entirely excluded from the workplace."[9] An employer has the duty to act when it knows of a dangerous condition, even if the employer is complying with the regulations promulgated by the agency. "An employer violates the [OSH] Act, even if it is in compliance with all specific standards, if it knows that those specific standards are inadequate to protect its workers against the hazards of its particular workplace."[10] The OSH Act also protects employees from retaliation if they file charges with the agency or complain about workplace safety conditions.[11] It also protects workers who refuse to work under unsafe conditions, if those workers can show that the refusal was reasonable, that they were

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[4] 29 U.S.C. § 667(c). There are currently 22 such state-plan states and territories.
[5] This discussion is intended to briefly summarize some of the most important principles of occupational safety and health law as a starting point. Many of the intricacies of occupational safety and health law are contained in the treatise *Cf.* GREGORY N. DALE & KATHERINE TRACY, OCCUPATIONAL SAFETY AND HEALTH LAW (4th ed. 2018), which is a project of the ABA Section of Labor and Employment Law.
[6] 29 U.S.C. § 651 (b).
[7] 29 U.S.C. § 655 (b)(5).
[8] 29 U.S.C. § 654 (a)(1).
[9] *National Realty v. OSHRC*, 489 F.2d 1257, 1267 (D.C. Cir. 1973).
[10] *UAW v. General Dynamics Land Systems*, 815 F.2d 1570, 1577 (D.C. Cir. 1987).
[11] 29 U.S.C. § 660(c).

willing to perform work that was not unsafe, and that it was not possible to use the normal enforcement mechanisms of the agency to fix the dangerous condition.[12]

These are beautiful words and concepts. Employers must prevent hazards at work. But, since the passage of the OSH Act, several factors have undermined this straightforward command. One is that many governmental employees are not covered.[13] Second, the agency is chronically underfunded. The number of OSHA inspectors has steadily declined for decades – as of 2019, it would take at least 162 years for inspectors to visit every covered workplace.[14] Third, it literally takes decades for the agency to promulgate new safety and health regulations. Since OSHA contains no private enforcement mechanisms, the main remedy that most workers have when confronted with a novel workplace hazard is to file a complaint with OSHA under the general duty clause and to hope that the agency takes action.

A good example of the inadequacies of OSHA safety and health enforcement efforts came at the outset of the pandemic. Coronavirus cases surged in the meat packing industry. A congressional analysis of this surge found that there were 59,000 infections and 269 deaths among meat packing workers between February 2020 and February 2021 in the five largest companies in the industry.[15] In some plants, 40–50% of the workers became infected.[16] The disease in the plants contributed to community spread, with one study estimating that there were 236,000 to 310,000 excess cases and 4,300 to 5,200 excess deaths in communities with livestock plants.[17] During the surge, the industry successfully lobbied the USDA and other federal officials to minimize protections for the mostly immigrant and minority workers in the plants and convinced President Trump to issue an Executive Order under the Defense Production Act in an effort to ensure that state and local health officials could not order plant closures.[18]

OSHA did practically nothing to protect workers against COVID-19. Even though it received over a hundred complaints, it issued just nine citations against three companies.[19] It made a political decision not to seek an emergency temporary standard to

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[12] *Whirlpool Corp. v. Marshall*, 445 U.S. 1 (1980).
[13] By its terms, the OSH Act does not cover governmental employees. 29 U.S.C. § 652. State plan states must cover the governmental employees in the State. In addition, there are a few states which have a state plan only for governmental employees. Illinois is one of these states.
[14] David Michaels, *America's Workplaces Are Still Too Dangerous*, N.Y. TIMES (Apr. 21, 2022). In a recent Congressional hearing, Secretary of Labor Marty Walsh called OSHA "significantly understaffed." House Appropriations Subcommittee on Labor, Health and Human Services, Education and Related Agencies Holds Hearing on the Fiscal Year 2023 Labor Budget Request, 117 Cong. (2022). The agency had only 750 inspectors. *See* Paige Smith & Rebecca Rainey, *Prioritize Workplace Safety in 2023 Budget, Labor Chief Says*, DAILY LABOR REPORT (May 17, 2022). *See generally* AFL-CIO, DEATH ON THE JOB: THE TOLL OF NEGLECT (2022).
[15] Majority Staff Memorandum of the U.S. H.R. Select Comm. on the Coronavirus Crisis at 2 (Oct. 27, 2021) (hereinafter "House Meatpacking Report")"). As noted by the Report, the numbers are likely undercounts.
[16] House Meatpacking Report at 2.
[17] Charles A. Taylor, Christopher Boulos & Douglas Almond, *Livestock Plants and Covid-19 Transmission*, 117 PROC. NATL. ACAD. SCI. 31706 (2020).
[18] Staff Report of the U.S. H.R. Select Comm. on the Coronavirus Crisis, at 27-32 (May 12, 2022).
[19] Kyle Bagenstone, Kyle Chadde & Rachel Axon, *COVID-19 Deaths Go Uninvestigated as OSHA Takes a Hands-Off Approach to Meatpacking Plants,* USA TODAY (Updated Jan. 26, 2021),

address the surge.[20] And, it did very little to coordinate with the USDA to help protect worker safety.[21]

As the surge worsened, a group of workers brought a "public nuisance" suit in federal district court in the Western District of Missouri. The theory was that the failure of the company to take adequate protective measures contributed to the spread of the disease in the plant and the community, which constituted a nuisance sufficient to require injunctive relief.[22] The Court dismissed the case.[23] It held that OSHA and the USDA had primary jurisdiction over the safety of the workplace and that it was inappropriate for the Court to act to displace that jurisdiction. It also credited the Company's claim that it had put safety measures into place.[24]

The workers at McDonald's in Chicago had better luck. In *Massey v. McDonald's*, workers and their family members sued in the Circuit Court of Cook County, claiming that McDonald's created a public nuisance when it failed to implement policies advised by Centers for Disease Control (CDC) guidelines and required by State Executive Order.[25] Plaintiffs' initial complaints included the company's failures to: (1) provide accurate information about COVID-19 and how it spreads, (2) provide adequate supplies of face coverings and gloves, (3) provide adequate of hand sanitizer for workers and customers, (4) enforce policies requiring employees to wear face coverings during their shifts and requiring customers to wear face coverings, (5) monitor infections among workers and to inform co-workers if an employee became infected or had the symptoms of COVD-19, (6) train employees in proper hand washing practice and other preventive measures recommended by the CDC; and (7) implement proper social distancing measures to protect employees from the spread of the diseases due to contact with other employees or customers.[26]

The plaintiffs sought a preliminary injunction and relied on the common law of nuisance as reflected in Illinois court decisions.[27] The public nuisance doctrine has often been applied to situations like a factory producing hazardous pollution, and there is also a long history of applying it to protect the public from the spread of infectious diseases.[28]

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https://www.usatoday.com/in-depth/news/2021/01/11/covid-19-deaths-not-investigated-osha-meatpacking-plants/6537524002/.

[20] House Meatpacking Report at 3.

[21] U.S. DEP'T OF LABOR, OFF. OF INSPECTOR GEN. – OFF. OF AUDIT, Rep. No. 19-22-003-10-105, COVID-19: TO PROTECT MISSION CRITICAL WORKERS, OSHA COULD LEVERAGE INSPECTION COLLABORATION OPPORTUNITIES WITH EXTERNAL FEDERAL AGENCIES 2-3 (Mar. 31, 2022).

[22] *Rural Community Workers Alliance v. Smithfield Foods Inc. et al.*, 459 F.Supp.3d 1228 (W.D. Mo. 2020).

[23] *Id.*

[24] *Id.*

[25] Massey v. McDonald's Corp., No. 20 CH 4247 (Ill. Cir. Ct. June 24, 2020).

[26] *Id.*

[27] *See Wilsonville v. SCA Services*, 86 Ill. 2d 1 (1981) (upholding a public right to be free from an environment that may endanger the public health).

[28] *Durand et al. v. Dyson et al.*, 271 Ill. 382, 389 (1915); *See also* Restatement (Second) of Torts § 821B, (Am. Law. Inst. 1979) (the threat of communication of smallpox to a single person may be enough to constitute a public nuisance because of the possibility of an epidemic.); *cf. Heigert v. Riedel*, 206 Ill. App. 3d 556, 562 (5th Dist. 1990) (noting that "the prevention and control of communicable diseases is a momentous task which is of the utmost importance to the health and welfare of our citizens.").

In Illinois, the elements of a public nuisance are similar to the elements of other common law torts: (1) the existence of a public right, (2) a substantial and unreasonable interference with that right by the defendants, (3) proximate cause, and (4) injury.[29] The courts need not wait for the harm from the public nuisance to occur before acting, but may impose injunctive relief based upon a showing that harm is "highly probable."[30]

McDonald's moved to dismiss the complaint, arguing based upon *Rural Community Workers Alliance*, that OSHA and state and local public health agencies had primary jurisdiction to resolve the issues in the case. The Circuit Court disagreed, holding that it had jurisdiction in a case involving substantial risk to public health.[31]

In the trial on the motion for a preliminary injunction, the plaintiffs testified in detail about the problems in their restaurants, focusing on the stores' continuing failure to (1) require use of masks by managers, employees, and customers, (2) ensure that employees engaged in proper social distancing, and (3) communicate information about employees who had become infected and take proper measures to identify other workers who had been exposed to the disease.

The Court held that "for the purposes of a preliminary injunction, the Court must determine what is actually being done in the stores presently. There is no reason to enjoin conduct that has been remedied as it no longer poses a health risk."[32] It found that McDonald's had shown that it was currently providing information to employees, that it was enforcing the requirement that customers wear masks, that it was currently providing adequate masks, gloves and sanitizer to its workers, and that it had procedures in place to identify and notify workers who were exposed to infectious co-workers. In so holding, the court rejected the plaintiffs' argument that it should impose a "maintenance of efforts" order as to the "voluntary" abatement measures McDonald's took after the lawsuit was filed.

The court granted the preliminary injunction on the issues of social distancing and proper use of face coverings. It found that McDonald's was "not properly training its employees on social distancing or training them in a way that is consistent with the Governor's Executive Order."[33] In addition, it held the defendants had committed a "serious failure" by failing to enforce their policies on mask wearing. It concluded that the combination of these failures created a health risk for employees, their families, and the public, and conflicted with the Governor's Executive Orders.[34] It noted that "'trying your best' in a pandemic can still cause substantial interference with the public health ... Defendant's inability to ensure that employees are appropriately covering their face when not 6 feet

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[29] *Burns v. Simon Props. Group LLP*, 2013 IL App (5th) 120325.
[30] *Wilsonville,* 86 Ill. 2d at 26.
[31] *See e.g.*, *Bensenville v. Chicago,* 383 Ill. App. 3d 446 (2nd Dist. 2009); *Scott v. U.S. Steel Corp.*, 40 Ill. App. 3d 607 (1st Dist. 1976).
[32] *Massey*, *supra* note 25.
[33] *Id.* at 14.
[34] *Id.* at 17-18.

apart is unreasonable given the magnitude of the potential consequence."[35] It concluded that the plaintiffs had shown a likelihood of success on the merits of their public nuisance claim.[36]

The court then held that the plaintiffs met the other requirements for preliminary relief, stating that "it is difficult to imagine a harm more irreparable than serious illness or death caused by this highly contagious disease [and that the plaintiffs] simply want to work in an environment where their health and safety is not put at risk."[37] The court also found the balance of equities supported the plaintiffs. It explained that on one hand, the plaintiffs were seeking to require McDonald's to enforce its own policies as supported by the Governor's Executive Orders and guidance from the CDC; and on the other, the "potential risk of harm to these Plaintiffs and the community at large is severe [and] may very well be a matter of life and death to individuals who come in contact with these restaurants or employees of these restaurants on a regular, or even semi-regular basis, during the COVID-19 pandemic."[38] The court therefore granted preliminary relief requiring McDonald's to retrain employees about social distancing in a way consistent with the Governor's Executive Order and requiring McDonald's to better enforce its polices on face coverings.

While every case has its own unique characteristics, the plaintiffs in *Massey* had three important advantages that the plaintiffs in *Rural Community Workers Alliance* did not. First, they were proceeding in a densely populated metropolitan area susceptible to surges in the pandemic in the wider community. Second, they were able to rely on the specific provisions of a gubernatorial Executive Order to establish a standard of care. Third, and most importantly, they had the support of the Fast Food Workers Union.[39] The Union provided great assistance to the plaintiffs in the litigation. It also provided a measure of protection to the plaintiffs against employer retaliation, which allowed them to come forward and provide direct firsthand evidence of their claims. This allowed them to credibly contradict the Company's claims that its stores were in compliance with policies regarding mask wearing and social distancing.

Notwithstanding the success of the plaintiffs in Massey, there are significant limits to the use of the public nuisance doctrine. The doctrine is not well suited to situations where the conditions of the pandemic are evolving, and it is not well suited to situations where government regulation has not yet caught up to scientific research. Moreover, unless there is some ability to monitor ongoing working conditions, an injunction might prove to be an empty remedy.

This is where a union comes in. As noted above, it will almost always be easier to prove a case when a union is actively involved in organizing and representing the employees of an employer because the union's efforts will ensure that plaintiffs have better access to

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[35] *Id.* at 22.
[36] *Id.* at 29.
[37] *Id.* at 33.
[38] *Id.* at 34.
[39] The Fast Food Workers Union, also often called the "Fight for $15," is an initiative sponsored by several unions to organize the workers in the fast food industry.

important evidence. As importantly, the union's ongoing presence in the workplace can ensure that safety procedures are followed at the work site and that procedures evolve to meet new conditions. What follows is an explanation of the labor law and collective bargaining principles that can be used to ensure safe and healthy workplaces.

III. PANDEMIC PHASE II: USING LABOR LAW TO PROTECT EMPLOYEES RETURNING TO WORK

Under federal law, workers have a right to engage in concerted activity to improve safety conditions.[40] They also have the right to refuse to engage in work that is abnormally dangerous.[41] In addition, the Courts have long held that health and safety is a mandatory subject of bargaining under the National Labor Relations Act.[42] This means that unions are entitled to information regarding the safety of the workplace.[43] And, unions are also entitled to have their own experts enter the employer's premises to review health and safety conditions.[44]

In response to the pandemic, public universities in Illinois switched to remote learning in March of 2020. Remote learning continued for the remainder of the spring semester. There was no centralized plan in higher education in Illinois for the Fall of 2020, and different institutions adopted different strategies for ensuring the safety of faculty, staff, and students. Late in May, the President of Western Illinois University announced that the University would reopen with in-person classes when the fall semester began in August. The Union representing the faculty and staff promptly demanded to bargain over this decision because it directly affected the health and safety of the members represented by the Union. When the parties first met to bargain, the Union proposed that faculty members be able to choose the "modality" of their courses, i.e. whether they would be held in-person, remotely, or in some combined "hybrid" fashion. University representatives informed the Union that the decision to hold in-person classes had already been made. Not surprisingly, negotiations did not progress. The Union filed unfair labor practice charges under Sections 14(a)(1) and 14(a)(5) of the Illinois

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[40] *N.L.R.B v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962).

[41] 29 U.S.C. §143.

[42] *N.L.R.B v. Gulf Power Co.,* 384 F. 2d 822, 824 (5th Cir. 1967) ("It is inescapable that in a public utility generating and transmission company the workers, through their chosen representative, should have the right to bargain with the Company in reference to safe work practices"); *Voith Indus. Serv. Inc. and Gen. Drivers, Warehousemen & Helpers, Loc. Union No. 89, Affiliated with the Int. Bhd. of Teamsters*, 363 N.L.R.B No. 109 (2016) (Employer that implemented a new rule requiring employees to load rail cars during the night, which forced employees to feel their way around metal cars in the dark, concerned "work conditions related to safety" and gave "rise to obligation to bargain"); *Castle Hill Health Care Ctr.*, 355 N.L.R.B 1156, 1183 (N.L.R.B 2010) ("workplace safety is a mandatory subject of bargaining.")

[43] *Oil Chem. & Atomic Workers Loc. Union No. 6-418, AFL-CIO v. N.L.R.B*, 711 F.2d 348 (D.C. Cir. 1983) (union was entitled to receive a wide range of information because employees were exposed to potential hazards in employment and had legitimate concerns over their health and safety). *See Kennametal, Inc.,* 358 N.L.R.B No. 68 (2012).

[44] *American Nat'l Can*, 293 N.L.R.B 901 (1989), *enforced, NLRB v. American Nat'l Can*, 925 F.2d 518 (4th Cir. 1990) (The union was entitled to access the plant to monitor excessive heat in the workplace); *Holyoke Water Power Co.*, 273 N.L.R.B 1369 (1985), *enforced, N.L.R.B v. Holyoke Water Power Co.*, 778 F.2d 49, 53 (1st Cir., 1986) (evidence showed that union's need for access outweighed the employer's private property interest).

Educational Labor Relations Act and requested that the IELRB seek preliminary injunctive relief under Section 16(d) of that Act. The IELRB voted to grant the Union's motion to seek preliminary injunctive relief. It held that "there was good cause to believe that the Union would succeed in its argument that employee safety is a mandatory subject of bargaining."[45] The IELRB noted that "the fact that the University already announced its decision on the matter being bargained requires the Union to bargain uphill to reverse a decision that was made and publicly announced unilaterally. Such action violates the central command of the duty to bargain, which requires bargaining at a meaningful time over mandatory subjects of bargaining."[46] After the IELRB announced its decision to seek preliminary relief, the parties settled with a Memorandum of Understanding that allowed faculty and staff the right to choose whether to deliver their services in person, remotely or in a hybrid combination. The IELRB reaffirmed these principles when a high school district unilaterally ordered teachers to report to the schools to carry out their instructional duties.[47]

Elementary and high school districts struggled greatly with issues regarding returning to in-person learning in the fall of 2020 and the winter of 2020-21. The pandemic surged in the fall and then again early in the winter. Teachers and school administrators agreed that in-person teaching and learning was essential, but many teachers had no confidence in the ability of their school districts to provide a safe workplace.

Cicero District No. 99 was the site of a particularly contentious dispute over returning to teach in-person. The parties attempted unsuccessfully to negotiate an agreement regarding the return to in-person teaching in the summer and fall of 2020. During the negotiations, the District refused to specify the public health criteria it would use to determine whether to return to in-person classes. Nonetheless, the Superintendent unilaterally announced a plan for a "hybrid" return to in-person classes in December, even though the parties had not reached impasse or agreement in their negotiations. The Union filed unfair labor practice charges and sought relief under Section 16(d) of the IELRA.

In the meantime, teachers who believed that it was unsafe to return to in-person instruction continued to teach remotely. The School District took the position that the teachers were engaged in an illegal strike and sought a temporary restraining order requiring the teachers to return in-person. Judge Raymond Mitchell, of the Circuit Court of Cook County, however, held that the employees were not on strike because they were continuing to work remotely and denied the injunction.[48]

The District also began progressive discipline on teachers who refused to return for in-person instruction, arguing that the teachers were guilty of insubordination. The Union

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[45] *Univ. Professors of Ill. Local 4100, IFT-AFT, AFL-CIO, Western Illinois University*, Case No. 2021-CA-0009-C, slip op. at 2 (September 17, 2020).
[46] *Id.* at 3.
[47] *Proviso Twp. High Sch. Dist. 209*, No. 2021-CA-0041 (November 5, 2020) ("Employee safety is a mandatory subject of bargaining.").
[48] *Cicero Sch. Dist. No. 99 v. Cicero Council,* No. 2021 CH 0222, slip op. at 2 (Il. Ct. Cl. Jan. 27, 2021) ("Defendant has not called a strike, taken a strike vote, or given notice of a strike. More importantly, teachers continue to work: they are teaching students remotely as they have done since March.").

defended these allegations by arguing that teachers were engaging in protected concerted activity when they continued to work remotely because of their reasonable fears about the safety of returning to in-person instruction.[49]

The IELRB granted the Union's request to seek injunctive relief. It relied on its prior cases, which prohibited an employer from implementing unilateral changes over mandatory subjects of bargaining while good faith discussions were proceeding.[50] And, it held that "the District's refusal to provide the metrics it will use to determine when to return to the classroom, which involves employee safety, a mandatory subject of bargaining, likewise indicates bad faith bargaining in violation of the Act."[51]

After he issued his decision denying the District's request for a TRO, and after the IELRB's lawsuit seeking injunctive relief was consolidated with that initial lawsuit, Judge Mitchell encouraged the parties to enter into mediation to reach a settlement. At this point in time, vaccines were becoming widely available to teachers. Accordingly, the parties reached an agreement that provided additional time for teachers to become fully vaccinated before returning to in-person learning, that specified "triggers" for returning to remote learning, that set forth measures the District would put into place to increase the safety of in-person instruction, and that would erase the reprimands teachers had received for refusing to return when ordered by the Superintendent.[52]

Bargaining over workplace safety during a pandemic has much to commend it. The contagious and deadly nature of the virus means that public institutions, employers, and employees should eliminate unnecessary risks to the health and safety of employees. A guiding principle is that all measures to reduce the health and safety risks must be considered. "The more a person interacts with different people, and the longer and closer the interaction, the higher the risk of COVID-19 spread."[53] Thus, the CDC advises that "[c]ommunity mitigation strategies should be layered upon one another and used at the same time – with several layers of safeguards to reduce the spread of disease and lower the risk of another spike in cases and deaths. No one strategy is sufficient."[54] In the

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[49] The teachers relied on *Alleluia Cushion*, 221 NLRB 999 (N.L.R.B 1975) and subsequent NLRB cases that held that individual employees engaged in a protected concerted activity when they refused to operate unsafe equipment. *See, e.g., Pace Motor Lines*, 262 NLRB 1395 (N.L.R.B 1982); *Pink Moody*, 237 NLRB 39 (N.L.R.B 1978). These cases were overruled by the NLRB in *Meyers Indus.*, 263 NLRB 493 (N.L.R.B 1984). However, the IELRB, has continued to follow the standard from *Alleluia Cushion*. *See also, Schaumburg Cmty. Consol. Sch. Dist. No. 54,* 7 PERI 1053 (1991) (finding that an employee engaged in protected concerted activity when she questioned her principal regarding whether her evaluation met the statutory requirements for evaluations).

[50] *Cicero Sch. Dist. No.99*, No. 2021 CH, slip op. at 2-3.

[51] Id. at 3.

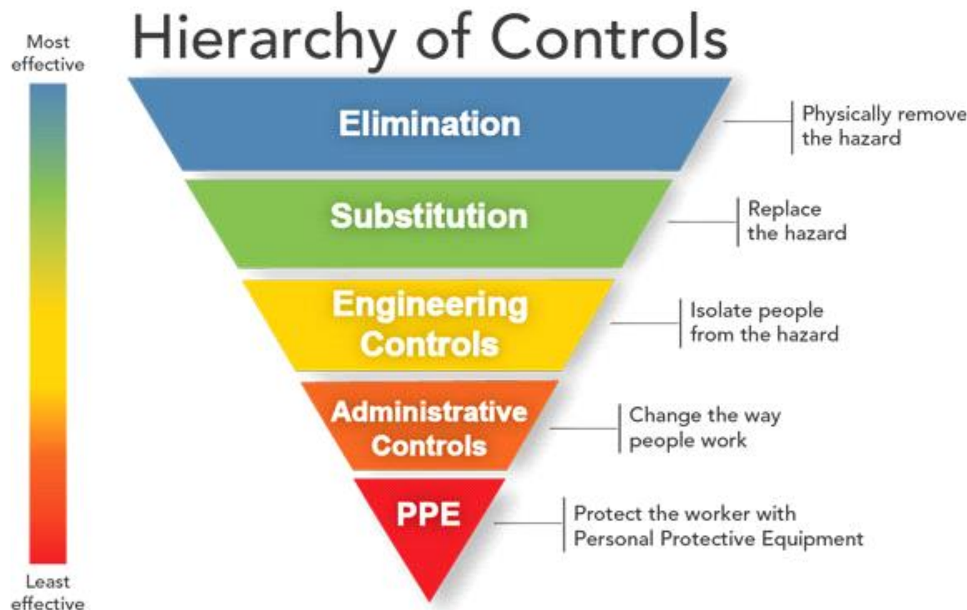
[52] The dispute did not progress to a point where the school district considered shutting down the on-line platforms for the teachers who continued to work remotely. Whether such a "lockout" is permitted under the IELRA is an open question, especially if it occurs in a dispute where it can be argued that the purpose of the action is to enhance the bargaining position for the employer after the employer has unilaterally changed working conditions.

[53] CENTERS FOR DISEASE CONTROL, NAT'L CTR. FOR IMMUNIZATION & RESPIRATORY DISEASES, DIV. OF VIRAL DISEASES, *Implementation of Mitigation Strategies for Communities with Local COVID-19 Transmission* at 2 (Updated October 29, 2020), https://stacks.cdc.gov/view/cdc/96156.

[54] *Id.*

popular vernacular, this is referred to as the "Swiss cheese" approach because several layers of protection (slices of cheese) are required to ensure that there are as few holes as possible in the barriers to the transmission of the virus.[55]

A central concept used in the prevention of workplace injury and disease is the "hierarchy of controls."[56] The hierarchy looks like this:



The idea behind this hierarchy is that the control methods at the top of graphic are potentially more effective and protective than those at the bottom. Following this hierarchy normally leads to the implementation of inherently safer systems, where the risk of illness or injury has been substantially reduced. According to the National Institute of Occupational Safety and Health (NIOSH), the research arm of OSHA,

> engineering controls are favored over administrative and personal protective equipment (PPE) for controlling existing worker exposures in the workplace because they are designed to remove the hazard at the source, before it comes in contact with the worker. Well-designed engineering controls can be highly effective in protecting workers and will typically be independent of worker interactions to provide this high level of protection. The initial cost of engineering controls can be higher than the cost of administrative controls or PPE, but over the longer term, operating costs are frequently lower, and in some instances, can provide a cost savings in other areas of the process. Administrative controls and PPE are frequently used with existing processes where hazards are not particularly well controlled. Administrative controls and PPE programs

[55] Siobhan Roberts, *The Swiss Cheese Model of Pandemic Defense*, N.Y TIMES (December 7, 2020).
[56] CENTERS FOR DISEASE CONTROL, NAT'L INST. OF OCC. SCI. & HEATH, *Hierarchy of Controls*, (October 29, 2020) https://www.cdc.gov/niosh/topics/hierarchy/default.html.

> may be relatively inexpensive to establish but, over the long term, can be very costly to sustain. These methods for protecting workers have also proven to be less effective than other measures, requiring significant effort by the affected workers.[57]

The requirement of bargaining allows the parties to determine which set of controls fits a particular workplace. If the employer has the right heating and cooling systems, use of better air filters (MIRV 13) can go a long way towards reducing the risk of the spread of disease. If not, the employer may have to pay additional attention to issues like social distancing, the use of masks, and hybrid learning to limit the exposure that individuals have. And, while improved ventilation systems may be costlier "up front," reduced expenditures for airborne infectious disease outbreaks and improved learning outcomes might well justify the expense.[58] There is no reason why the parties should not be able to bargain about all of the potential controls that can reduce the risk of safety and health hazards in the workplace.

Of course, bargaining is no panacea. Much of bargaining has to do with leverage, not science. Too, in the public sector, the parties work furiously to develop messages for the public to generate popular support for their respective strategies. The messages may or may not reflect the best science for the conditions in a particular workplace. Employers and their lawyers are skilled at getting to the point where they can declare "impasse" and lawfully implement new terms of employment. Bargaining is much more effective when it has an underpinning in public regulation of workplace hazards.

Bargaining is also much more effective when contract language exists to back it up. The contract between the Chicago Teachers Union and the Chicago Public Schools requires CPS to maintain a safe and healthy working environment. When CPS ordered School Clerks to return to in person work at schools in the fall of 2020, the CTU grieved, arguing that most of the work in question could be done remotely. Based upon evidence regarding the dangers of the disease and the failure of the district to put adequate controls in place, an arbitrator ruled that the district could only require the Clerks to report to work on a limited basis, to perform duties that had to be carried out in-person.[59]

IV. PANDEMIC PHASE III: VACCINATION WARS

The litigation in Cicero could have taken years. The parties were able to come to an agreement in part because of two outside events: readily available vaccinations and the promise that federal OSHA would promulgate an emergency standard regarding the control of coronavirus in the workplace. In March 2021, it appeared that these two events

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[57] *Id.*

[58] E.g., Sanjana Pampati et al., *Ventilation Improvement Strategies Among K–12 Public Schools — The National School COVID-19 Prevention Study, United States, February 14–March 27, 2022*, 17 MMWR MORB. MORTAL. WKLY. REP. (2022), https://www.cdc.gov/mmwr/volumes/71/wr/mm7123e2.html.; W.J. Fisk, *The Ventilation Problem in Schools: Literature Review*, 27 INDOOR AIR (2017), https://doi.org/10.1111/ina.12403.

[59] *Chi. Tchr. Union Local 1, AFT v. Chi. Bd. of Educ.,* Case No. 20-08-038 (se) (November 12, 2020) (Charles, Arb.) (holding that the District's order instructing school clerks to perform duties in person that could be done remotely violated the contract).

night reduce the contentious fights regarding occupational exposure to coronavirus, especially those in public education.

The vaccines seemed like a miracle in terms of their effectiveness. And the prospect of a federal rule that would endorse a layered approach to protecting workplaces also heartened many workplace safety advocates. This brief moment of hope was interrupted by several other events.

First, it turned out that the vaccines were very effective at preventing hospitalization and death, but much less effective at preventing the transmission of the disease, especially as new variants emerged.[60]

Second, a significant "anti-vax" movement emerged, which stalled hopes of eradicating the disease. The size of the anti-vax movement, especially in public safety positions, has created difficult situations for political leaders. In California, for example, the Governor and the Department of Corrections opposed a vaccine mandate ordered by a federal monitor because they feared that hundreds of correctional officers would retire, making the prisons more unsafe than ever.[61] Union leaders have faced contentious factions in their membership as well. And, the antivax movement has fueled other litigation regarding mask and quarantine requirements in public facilities.[62]

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[60] See, e.g., Catherine Burugorri-Pierre et al., *Investigation of an Outbreak of COVID-19 in French Nursing Home with Most Residents Vaccinated,* JAMA NETW. OPEN 4 (2021), https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2783985.; Catherine M. Brown et al., *Outbreak of SARS-CoV-2 Infections, Including COVID-19 Vaccine Breakthrough Infections, Associated with Large Public Gatherings – Barnstable County, Massachusetts, July 2021,* 70 MMWR MORB. MORTAL. WKLY. REP. (2021), https://www.cdc.gov/mmwr/volumes/70/wr/mm7031e2.html.; Liesl M. Hagan et al., *Outbreak of SARS-CoV-2 B.1.617.2 (Delta) Variant Infections Among Incarcerated Persons in a Federal Prison – Texas, July-August 2021*, 70 MMMR MORB. MORTAL. WKLY. REP. (2021), https://www.cdc.gov/mmwr/volumes/70/wr/mm7038e3.html.; Anika Singanayagam et al. *Community transmission and viral load kinetics of the SARS-CoV-2 delta (B.1.617.2) variant in vaccinated and unvaccinated individuals in the UK: a prospective longitudinal, cohort* study, 22 THE LANCET (2021) https://www.thelancet.com/journals/laninf/article/PIIS1473-3099(21)00648-4/fulltext. The more recent omicron variants, for example, spread easily even in vaccinated populations. See, e.g. Lihong Liu et al., *Striking antibody evasion manifested by the Omicron variant of SAR-CoV-2,* NATURE (Dec. 23, 2021), https://www.nature.com/articles/s41586-021-04388-0; *SARS-CoV-2 B.1.1.529 (Omicron) Variant – United States, December 1-8*, 70 MMWR MORB. MORTAL. WKLY. REP. (2021), https://www.cdc.gov/mmwr/volumes/70/wr/mm7050e1.html (chart showing that 34 of 43 cases of omicron variant had occurred in vaccinated individuals); Carolyn Crist, *Cornell University Reports 930 COVID Cases, Including Omicron Variant,* WEDMD (December 15, 2021) (noting that virtually every case of the Omicron variant to date at Cornell has occurred in fully vaccinated students, including some who received a booster shot), https://www.webmd.com/lung/news/20211215/cornell-university-covid-cases-omicron.

[61] *See Plata v. Newsom*, No. 21-16696 (9th Cir., April 25, 2022) (unpublished order vacating a mandatory vaccination policy because evidence did not show that COVID policies were deliberately indifferent to risks of COVID and noting concern that hundreds of correctional officers might retire and undermine ability of corrections system to operate safely).

[62] *See, e.g., Allen v. Bd. of Educ. of N. Mac Community Unit Sch. Dist. No. 34*, 2022 IL App (4th) 220307-U, 4 (vacating orders prohibiting school district from taking protective measures such as requiring vaccination or regular testing for coronavirus); *Glass v. Illinois Department of Corrections*, 2022 IL App (4th) 220270, 8 (upholding policies that require government employees to receive COVID vaccinations or submit to regular COVID testing).

Third, rather than enacting general laws requiring vaccination,[63] political leaders pursued policies that required employees to get vaccinated as a condition of their employment. Many of those policies, such as the ones promulgated by the City of Chicago and the County of Cook, were based upon the claim that workplaces would be unsafe without mandatory vaccination. The policies in the City and the County were unilaterally announced and exclusive representatives have filed unfair labor practice charges arguing that the employers were required to bargain over the decision to implement such policies, not just the impact.[64]

Fourth, rather than issuing a rule that emphasized all layers of prevention, OSHA issued a rule requiring private sector employers to require vaccination or regular testing of employees, but with a decided preference for mandatory vaccination. After conflicting decisions in the US Court of Appeals[65] the US Supreme Court then ruled that the rule was an unlawful exercise of the powers given to OSHA by Congress.[66] OSHA is now focused on issuing a permanent rule for health care employees.

V. CONCLUSION

The confluence of events that developed over the three phases of the pandemic produced some ironies. Employers who proclaimed that their workplaces were safe and who required employees to return to in-person work in the first half of 2021, have now argued that these same workplaces are unsafe unless employees get vaccinated. Unions who had argued that workplaces were unsafe, question why employers who had proclaimed their workplaces safe now needed an extra measure of protection. And they point out that the vaccines do little to prevent the transmission of the disease, which means that employers without testing programs (which have been reduced or eliminated as the vaccine mandates have taken effect) are flying in the dark with respect to the extent of the disease in their workplaces. Unions have also argued that the implementation of a mandatory vaccination requirement also tends to let employers off the hook for other preventative measures.[67]

At the beginning of the pandemic, public health authorities placed great emphasis on the possibility that the virus was transmitted by surface contact. Many, including this author,

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[63] *See Jacobsen v. Massachusetts*, 197 U.S. 11,12 (1905)

[64] *Virginia Mason Hospital*, 357 N.L.R.B 564, 564 (2011) (holding that the issue of immunization is a mandatory subject for bargaining). *See also, Mem. from the Acting Assoc. Gen. Couns. of the Nat'l Lab. Rel. Bd. to all Reg'l Dir., Officers-in-Charge, and Resident Officers (Nov. 10, 2021) (on file with author)* (stating that employers had the obligation to bargain about decisions in the OSHA ETS, where the ETS provided employers with implementation options). At a minimum, public employers must bargain in good faith regarding disciplinary consequences to employees who refuse immunizations prior to implementing mandatory vaccinations. *See, e. g. American Federation of State, County and Municipal Employees v. Illinois State Labor Relations Board,* 190 Ill. App. 3d 259, 269 (1st Dist. 1989) (imposing obligation on Illinois Department of Corrections to bargain about disciplinary consequences of drug testing program).

[65] *Compare BST Holdings, L.L.C. v. Occupational Safety and Health Administration, U.S. Dept. of Lab.*, 17 F.4th 604 (5th Cir. 2021) and *Mass. Bldg. Trades Council v. United States DOL*, 21 F.4 357 (6th Cir. 2021).

[66] *NFIB v. OSHA*, 142 S. Ct. 661, 665 (2022).

[67] *See State of Illinois, Department of Central Management Services*, S-MA-22-121, Dissent of Union Delegate Caumiant, 4, 6-7 (Dec. 30, 2021) (Benn, Arb.).

spent hours with alcohol wipes, cleaning surfaces such as doorknobs, phones, counters, automobile dashboards and even groceries. We now refer to these actions as "Covid theater." It is hard to escape the conclusion that mandatory vaccination of employees is just another version of this "Covid theater," one that allows institutions to dodge investment in engineering controls that clean the air instead of countertops.

The impetus for safer workplaces often arises from dramatic events: deaths in a coal mine, locked fire doors, explosions that devastate an entire sugar processing facility. It is a measure of our times that neither the morbidity and mortality in the meatpacking industry or the million deaths due to coronavirus has yet to lead to lasting measures to improve occupational and public health. In the private sector, concentrations of power and wealth have prevented many advances in occupational safety and health. In the public sector, decades of disinvestment in governmental functions have led to the same result.

There is great restlessness in both organized and unorganized labor in the nation. Generally, workforces represented by unions, especially in situations where the unions had economic or political leverage, were able to force greater safety protections during surges in the pandemic. It appears that many previously unorganized workforces, such as those at Starbucks, Amazon, Target, Apple and more, have hope that collective activity will lead to better working conditions. This activism should lead to safer workplace conditions and, perhaps, in the longer run, to better statutory protections as well. In the meantime, occupational safety and health advocates will have to follow the advice of Mother Jones "to mourn the dead and to fight like hell for the living."

RECENT DEVELOPMENTS

By Student Editorial Board:
Bradley Kupiec, Carrie Kumiega, Damia Marshall, Sara Rash

I. LAWSUITS CHALLENGING COVID REQUIREMENTS

A. Fire Departments

In *Graham v Pekin Fire Department et al.,* 2022 IL App (4th) 220270, the Court evaluated the claims from consolidated appeals from several public employees who sought declaratory and injunctive relief against their employers, the Governor, and the Department of Public Health. These employees alleged that based on an executive order issued by Governor Pritzker, their employers required all employees to either become fully vaccinated against COVID-19 or get regular testing for the virus. Failure to comply could lead to unpaid suspension or discharge.

The employees filed two claims: (1) imposing a vaccination or testing policy was an act of discrimination that violated the Illinois Health Care Right of Conscience Act; and (2) the policy was unauthorized by law because only the Health Department had authority to impose policies upon public employees.

Regarding the first claim, the appellate court affirmed that the employees had not established they were likely to succeed on the merits of their claim, in part because the General Assembly had recently amended the Conscience Act to create a COVID carve out, clarifying that employers *can* require vaccinations or testing without violating the Act.

In analyzing the second claim, the court noted that although it is true that the Health Act gives the Health Department authority to compel vaccination, isolation, and quarantine and gives the Department "supreme authority in matters of quarantine and isolation," employers still retain power to establish workplace safety rules. Here, the vaccination and testing policies in question were not a decision on *public* health because the policies were not calculated to maintain the health of the community at large. Rather the policies were workplace safety and workplace conduct rules.

Accordingly, the appellate court affirmed the lower court on this claim, too, agreeing that the employees failed to establish the likelihood of success on the merits.

B. Department of Corrections

In *Thornton v. Illinois Department of Corrections*, the plaintiffs alleged that the Department of Corrections violated their due process rights under the Illinois Department of Public Health Act when it implemented a COVID-19 vaccination and testing policy. The plaintiffs also filed a temporary restraining order to stop the

defendants from requiring the plaintiffs to submit vaccination records or regular testing as an employee.

The circuit court ruled that it lacked subject matter jurisdiction and denied the restraining order. The Supreme Court reviewed it on appeal and dismissed the case as moot.

The issue started when Governor Pritzker issued Executive Order 2021-22, which required most state employees to get vaccinated against COVID-19, absent a medical or religious exemption. This executive order also instructed CMS to negotiate the provisions with relevant labor unions. CMS negotiated with AFSCME regarding the vaccination and testing requirements, but the negotiation did not lead to an agreement. AFSCME invoked its right to proceed to interest arbitration under section 14 of the Illinois Public Labor Relations Act, and an arbitration panel determined that the state should mandate COVID-19 vaccinations for the employees covered under the CBA.

The plaintiffs filed suit claiming that the COVID-19 vaccination requirement violated the Public Health Act and that the interest arbitration award had no effect on their statutory rights. The defense argued that the Illinois Labor Relations Board has exclusive jurisdiction because the vaccine and testing requirements were a part of the terms and conditions of employment.

The court agreed, finding that it did not have subject matter jurisdiction to review the interest arbitration award unless the employer of the exclusive bargaining representative sought judicial review and the Illinois Labor Relations Board had exclusive jurisdiction over the plaintiff's claim.

The plaintiffs appealed, and the Illinois Supreme Court found that once the circuit court issued the order to dismiss the cause on the merits, the legal controversy was decided, and there was no status quo. Accordingly, the court found that the appeal was moot.

II. SCHOOLS

A. IDPH and ISBE Issue Update COVID-19 Guidance

Following recent Executive Orders, the IDPH and ISBE issued joint guidance, updated answers to many of its Frequently Asked Questions, and updated its "Decision Tree."

Executive Order 2022-06 (February 28, 2022) rescinded previous orders that mandated mask wearing. Moreover, Executive Order 2022-07 (March 4, 2022) lifted the exclusion requirements and schools returned to the original process of handling infectious diseases.

Accordingly, the joint guidance recommends but does not require individual communities to monitor hospitalizations, hospital capacity, and case numbers and adopt preventative measures when such metrics indicate that there is a potential to overwhelm the healthcare system. The guidance also recommends that anyone who has COVID-19 symptoms, a positive COVID-19 test, or known exposure to someone with COVID-19 wear a mask around others. The guidance also recommends certain other preventive techniques when

community levels of COVID-19 are "medium" or "high," such as physical distancing, screening testing, ventilation, hand washing, staying home, and getting tested.

The "Decision Tree" was updated and added that individuals should isolate for five calendar days upon testing positive for COVID-19 or displaying symptoms. Quarantined individuals may return to the public after five calendar days if they had no fever for 24 hours and had improved symptoms for days five through ten.

In addition, once a household member tests positive, any other household member who is not up to date with vaccinations should be sent home from school immediately to isolate. Any individual who had a confirmed case of COVID-19 within the past 90 days did need to be isolated if they were exposed.

Although the guidance did not address lunch procedures, the CDC recommended physical distance when the student moved through a food service line and while eating indoors. Moreover, the Illinois guidance encouraged schools to provide adequate distance for students who had just returned from isolation when eating. There is ongoing litigation regarding this mandate which makes it subject to change.

B. First Amendment Protections in School Board Meetings

In *Anderson v. Hansen*, 519 F. Supp. 3d 457 (E. D. Wis. 2021), Heidi Anderson, the mother of two students enrolled in the Elmbrook School District, brought a §1983 action against the district and its superintendent, alleging that they violated her First Amendment free speech rights by banning her from school grounds and censoring her speech online after she made comments during an August 11, 2020, school board meeting.

During public comments, Ms. Anderson expressed her opinion on the district's proposed response to the COVID-19 pandemic, including objections to having children wear masks and socially distance. She further stated that Dr. Mushar Hassan, the Board's medical liaison, was not the "right choice" to be the Board's medical liaison because he was "a leader in the Islamic community" and he might prefer to have the district's children wear face coverings.

Anderson's complaint alleged that the school district took three actions in response to her comments: 1) The school board's president and vice president signed a statement condemning Anderson's remarks about Dr. Hassan, which was posted on the district's website and emailed to a list "well in excess of 7,000 people"; 2) The district censored Anderson's speech when it removed Anderson's comments directed at Dr. Hassan from the archived video recording of the meeting, uploaded to the district's YouTube account, and when it allegedly deleted her comments on the district's Facebook post about the meeting; and 3) The district superintendent, Mark Hansen, sent Anderson a letter, copied to the Brookfield police department, informing her that she would no longer be allowed on any district property without the prior approval of the superintendent or principal of her children's school.

After Anderson filed her §1983 complaint, the trial judge granted a preliminary injunction against the ban, reasoning that while the district was allowed to place reasonable time, place, and manner restrictions on speakers at Board meetings, and to publicly disagree with a speaker's comments, it was not allowed to retaliate against Anderson for expressing an unpopular viewpoint. Following the issue of the preliminary injunction, the district withdrew the ban.

In ruling on the school's motion to dismiss Anderson's censorship claims, the court recognized that the First Amendment prohibited the district, a state actor, from excluding Anderson's speech from a "designated public forum" created by the district. However, the court clarified that the initial public meeting itself—not the video recording—was the "public forum." And since Anderson was allowed to speak her piece at the meeting, the district's removal of some of Anderson's commentary from the video recording of that meeting was not a First Amendment violation.

Additionally, the judge held that the school's letter condemning Anderson's comments aimed at Dr. Hassan was not a First Amendment violation, because the district, as a state actor, was allowed to counter Anderson's speech with its own speech.

Finally, however, the court ruled that the district's removal of her comments on a district Facebook *was* a potential First Amendment violation, because the school district did not delete comments made by other members of the public. Had the district engaged in a prior pattern of curating or controlling the comments on its posts, the comment sections would not have been considered a public forum. However, because the district had deleted *only* comments made by Anderson, it had turned the comment sections into a public forum within which the district was forbidden to regulate or censor speech on the basis of content. As such, the trial judge denied the school district's motion to dismiss the portion of Anderson's claim pertaining to the alleged deletion of her comments on the district's Facebook post.

C. New Sick Leave Amendment

Governor J.B Pritzker signed SB3914 into law as Public Act 102-0866, on Friday May 13, 2022. Effective immediately, the bill expanded the definition of "sick leave" to include leave for mental health or behavioral health reasons. School boards are permitted to require a certificate from a licensed Illinois professional who provided ongoing care or treatment to eligible educators or employees as a basis for pay during a leave of absence of three days for any mental or behavioral health complications.

D. Attorney Work Product During Investigations of Teacher Conduct

In *Board of Education of Deerfield Public Schools District No. 109 v. Deerfield Education Association*, 2022 IL App (4th) 210359, the Fourth District Appellate Court of Illinois determined that a school district is required to disclose to the union the notes that outside counsel drafted during investigative interviews.

Deerfield Public School District received complaints regarding a teacher, so the district hired outside counsel to investigate. During the investigation, the outside counsel interviewed parents, students, coworkers, and the teacher. Based on the counsel's recommendation, the district issued the teacher a "Notice of Remedial Warning." In response, the Union requested all the interview notes that the counsel took during the investigation.

The district refused, arguing that the notes were covered by the work product doctrine. However, the appellate court affirmed the Board's determination that the work product doctrine did not apply because the interview notes did not contain an attorney's mental impressions and the notes were not made in preparation of litigation.

III. PENSIONS

A. Police Pensions

In *Thornley v. Board of Trustees of the River Forest Police Pension Fund*, 2022 IL App (1st) 210835, Plaintiff Carrie Thornley brought the present appeal challenging the circuit court's decision to uphold the Defendant Board's denial of her claim that she was entitled to her late husband's police pension upon his death, even though he would not have been entitled to receive pension payments until the day he would have turned 60—December 12, 2032.

Carrie's late husband, Michael Thornley, had begun working for the River Forest Police Department in 1997, and married the defendant in 2004. Michael resigned from the department in 2015 and remained married to the plaintiff until his death in 2018, at age 45, at which time he was considered a deferred pensioner. As a deferred pensioner, he was entitled to a pension equal to 42.5% of his applicable pension salary, with pension payments to begin on his 60th birthday.

Carrie contended that, as a surviving spouse, she was entitled to her late husband's pension benefits beginning at the time of his death. Prior to a Board hearing on the matter, she received an advice letter issued by the Assistant General Counsel of the Illinois Department of Insurance (DOI) Public Pension Division. The DOI's advice letter opined that, while "there [was] no statutory guidance as to when a surviving spouse is entitled to begin collecting the pension of his/her deceased partner" assuming all the facts and assertions submitted to him by the Board were correct, Carrie would be entitled to receive Michael's survivor's pension "immediately upon the death of the deferred pensioner."

The Board rejected the DOI's opinion regarding the start date, because it would produce an absurd result, allowing Michael's death to accelerate the activation date of his pension rights. The circuit court and appellate court upheld the Board's decision, maintaining that the DOI's opinion letter did not equate to a binding opinion, and that the Board retained discretion to agree or disagree with the DOI.

Regarding the plaintiff's statutory argument, the appellate court reviewed the plain meaning of the applicable statutory language in 40 ILCS 5/3-112, which states that

"[u]pon the death of a police officer entitled to a pension under Section 3-111, the surviving spouse shall be entitled to the pension to which the police officer was then entitled." Accordingly, Carrie had inherited Michael's pension rights, or any payments Michael *was then* entitled to. Both parties agreed that, had Michael lived, he would not have been entitled to any payments until his 60th birthday. As such, the Appellate Court found that Carrie was only entitled to the same pension rights and associated payments as Michael would have been entitled to had he remained alive, and the statute did not intend or purport to alter the pension rights Carrie inherited as a surviving spouse.

B. Disability Pensions

In *O'Connell v. County of Cook*, 2022 IL 1127527, the Illinois Supreme Court held that an employee's disability pension could not be terminated solely because their employment had been terminated.

While working for Cook County, O'Connell was diagnosed with multiple sclerosis. Although he continued to work with accommodations, his health declined as the disease progressed. After exhausting paid leave, O'Connell applied for an ordinary disability benefit, and the Board granted the benefit at 50% of his salary. When O'Connell failed to provide medical documentation regarding his expected return-to-work date, the County terminated his employment and the Board ceased paying the disability benefit and making contributions to the Benefit Fund on his behalf.

O'Connell filed a complaint against the Board and the County alleging that the Illinois Pension Code and the pension protection clause of the Illinois Constitution allows him to continue ordinary disability benefit payments regardless of his termination.

Before the Illinois Supreme Court, the Board and the County argued that once the County terminated O'Connell's employment, he converted from a "current employee" to a "former employee" not entitled to the ordinary disability benefit pursuant to section 9-157 of the Pension Code. However, the Court determined that those arguments were misguided. Instead, the Court focused on when eligibility criteria is evaluated. The Court found that an applicant's status as employee and contributor, along with his disability, is determined at the time of his initial application. Once a benefit is granted, the Code lists several terminating events that discontinue a disability benefit, which do *not* include separation from employment.

The parties did not dispute that O'Connell was properly granted the ordinary disability benefit when he applied upon disability, and that no terminating event had occurred since. Accordingly, O'Connell maintained standing to seek reinstatement of his ordinary disability benefit by the Board and of contributions by the County.