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Refusing Work To Avoid Serious Injury or Death: An Empirical Study of Legal Protections Before and During COVID-19

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Refusing Work To Avoid Serious Injury or Death: An Empirical Study of Legal Protections Before and During COVID-19

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Abstract

I present data on court and administrative rulings involving employees who were disciplined or quit after refusing to work due to concerns about death or injury. My sample of 109 pre-pandemic cases from 1944–2020, and its comparison to twelve COVID-19 cases in 2020 and 2021, shows an emerging picture of new forms of work refusal. The cases before COVID-19 were concentrated in mining, construction, and transportation. In contrast, the COVID-19 cases span new occupations in social services, education, law, healthcare, protective services, food preparation, and building cleaning. Before COVID-19, employees lost most work refusal cases because laws such as the National Labor Relations Act, Occupational Safety Health Act, and others narrowly protect them from employer retaliation. In the past year, the Emergency Paid Sick Leave Act afforded workers broader protections; however, it expired at the end of 2020.

I conclude that work refusal laws are out of date in today's workplace because they apply mostly to work refusal in mines, construction, and trucking—male-dominated workplaces, with 10% to 30% female workers. These industrial settings do not reflect changes in the economy that have expanded jobs in service and office sectors or the growth of gig work that falls outside the protections of work refusal statutes.

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"One of the great needs in industry today is the protection of life and limb and health . . . . [W]e do not want to place in this law any provision which would require men to work under abnormally dangerous conditions."[1]

"We are talking about people's lives, not the indifference of some cost accountants. We are talking about assuring the men and women who work in our plants and factories that they will go home after a day's work with their bodies intact."[2]

"They never listen."[3]

I. INTRODUCTION

Does an employee have a right to refuse abnormally dangerous work conditions?[4] My research question is framed by a larger principle: Self-

* Michael H. LeRoy, LER Alumni Professor, School of Labor and Employment Relations and College of Law, University of Illinois at Urbana-Champaign. The idea for this research originated from a live interview on KCBS radio (San Francisco) on March 30, 2020, during an extremely anxious time when COVID-19 lockdowns were implemented across the country. Stan Bunger (KCBS Anchor), Nic Palmer (News Operations Manager), and Frni Beyer (Morning Editor) recognized the importance of work refusal during the pandemic and provided a catalyst for my research. My Research Assistants—Elizabeth Ayala, Hailey Buffone, and Alondra Rios—provided invaluable assistance under the stress and difficult circumstances of COVID-19. The LER Alumni Professorship funded this research. In addition, my project was supported by administrative assistance from Lynne Hoveln, Wyatt Martin, and Amanda Boyd. Janet LeRoy offered guidance and encouragement for conducting this research during an especially perilous time. To all of you, I owe my gratitude.

1. 92 CONG. REC. 5,687 (1946).

2. S. REP. NO. 91-1282, at 2 (1970), *reprinted in* SUBCOMM. ON LABOR OF THE S. COMM. ON LABOR & PUBLIC WELFARE, 92D CONG., LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970 (1971) [hereinafter LEG. HIST. OSHA].

3. May-Ying Lam, *Voices from the Aisles: The People Who Have Kept America's Grocery Stores Open*, WASH. POST (Jan. 7, 2021), https://www.washingtonpost.com/nation/2021/01/07/grocery-essential-workers-coronavirus/ (quoting Jacob Streich, a twenty-year-old cashier at Kroger, expressing his futile efforts to have unmasked customers comply with the store's masking policy).

4. *See infra* Part IV. Media outlets have attempted to answer this question, which was central for many employees who were forced to work through the most uncertain times of the COVID-19 pandemic; however, the issue continues to remain relevant as the pandemic rages on. *See generally* Madeleine Carlisle, *Scared To Return to Work Amid the COVID- 19 Pandemic? These Federal Laws Could Grant You Some Protections*, TIME (May 6, 2020), https://time.com/5832140/going-back-to-work-

preservation has been recognized for millennia.[5] Rome[6] and England[7] gave legal effect to this idea. American courts transplanted this fundamental right.[8]

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coronavirus-rights/ (citing several federal statutory protections that workers could consider in states with weak employment protection laws); Lisa MacLellan & Michelle Cheng, *Can You Quit and File for Unemployment if Your Workplace is Unsafe about COVID-19?*, QUARTZ (Jan. 22, 2021), https://qz.com/1961649/can-you-get-unemployment-if-your-job-is-unsafe-about-covid-19/ (outlining the unemployment benefit implications of workers who quit because of unsafe COVID-19 working conditions).

5. A. J. Ashworth, *Self-Defence and the Right to Life*, 34 CAMBRIDGE L.J. 282, 282 (1975) ("The idea of physical security as one of the 'natural rights' of mankind has a long history . . . ."). Authoritative commentators have noted the foundational aspects of self-preservation: For the soul, see ARISTOTLE, *Book* IX, *in* NICOMACHEAN ETHICS (W. D. Ross trans., 1999), https://historyofeconomicthought.mcmaster.ca/aristotle/Ethics.pdf ("Now each of these is true of the good man's relation to himself . . . . For . . . he desires the same things with all his soul; and therefore he wishes for himself what is good and what seems so, and does it . . . for his own sake (for he does it for the sake of the intellectual element in him, which is thought to be the man himself); and he wishes himself to live and be preserved . . . ."). For living organisms, see CHARLES DARWIN, ON THE ORIGIN OF SPECIES 201 (Adam M. Goldstein ed., 1859 London 2011), http://darwin.amnh.org/files/images/pdfs/e83461.pdf ("Natural selection will never produce in a being anything injurious to itself, for natural selection acts solely by and for the good of each. No organ will be formed . . . for the purpose of causing pain or for doing an injury to its possessor."). For the establishment of government as a means to promote self-preservation, see THOMAS HOBBES, LEVIATHAN 115 (Univ. of Mich. Rev. ed. 1904) (1651) ("The final[] Cause, End, or Design[] of men . . . in the introduction of that restraint upon themselves[] (in which we[] see them live in [commonwealths]) is the foresight of their own preservation, and of a more contented life thereby . . . ."). For preservation of the United States, see Abraham Lincoln, *House Divided Speech*, 2 COLLECTED WORKS OF ABRAHAM LINCOLN 452 (Roy P. Basler ed., 2006) ("A house divided against itself cannot stand. I believe this government cannot endure permanently half slave and half free."). For natural selections that are enabling COVID-19 to mutate along a track to permanence, see Bette Korber et al., *Spike Mutation Pipeline Reveals the Emergence of a More Transmissible Form of SARS-CoV-2*, BIORXIV 1, 12 (2020), https://www.biorxiv.org/content/10.1101/2020.04.29.069054v2.full.pdf+html ("[R]ecombination provides an opportunity for the virus to bring together, into a single recombinant virus, multiple mutations that independently confer distinct fitness advantages but that were carried separately in the two parental strains.").

6. *See* Will Tysse, *The Roman Legal Treatment of Self Defense and the Private Possession of Weapons in the Codex Justinianus*, 16 J. FIREARMS & PUB. POL'Y 163, 165 (2004) ("We grant to all persons the unrestricted power to defend themselves . . . so that it is proper to subject anyone, whether a private person or a soldier, who trespasses upon fields at night in search of plunder, or lays by busy roads plotting to assault passers-by, to immediate punishment in accordance with the authority granted to all.").

7. *See generally* Joseph H. Beale Jr., *Retreat from a Murderous Assault*, 16 HARV. L. REV. 567 (1903) (providing a comprehensive review of the English law on killing in self-defense). In short, "the right to kill in self-defense was slowly established[] and is a doctrine of modern rather than of medieval law." *Id.*

8. *See, e.g.*, Williams v. Register of West Tenn., 3 Tenn. 214, 218 (1812) ("A desire of self-preservation is the first law of all being."); Glasgow's Lessee v. Smith, 1 Tenn. 144, 166 (Tenn. Super.

In this study, I examine self-preservation in the context of COVID-19—specifically, when employees refuse work due to a concern of contracting this infection.[9] The COVID-19 pandemic has put many workers in a vice: One jaw is the necessity to work to subsist or to serve the public as a frontline worker. The other jaw is risk of serious illness or death.[10]

Specifically, employers in hospitals,[11] meatpacking plants,[12] grocery

Ct. L. & Eq. 1805) ("[N]ations as well as individuals are tenacious of the rights of self-preservation . . . ."); Griswold v. Waddington, 16 Johns. 438, 509 (N.Y. Ct. Err. 1819) ("[T]he unqualified inhibition of all intercourse and negotiations with an enemy, by the law of war, unless sanctioned by government, is dictated by the great law of self-preservation, which is immutable in its nature . . . ."); *see also* Runyan v. State, 57 Ind. 80, 83 (1877) ("This right of self-defence is commonly stated in the American cases thus: If the person assaulted, being himself without fault, reasonably apprehends death or great bodily harm to himself, unless he kills the assailant, the killing is justifiable.").

9. *See* Jack Healy, *Workers Fearful of the Coronavirus Are Getting Fired and Losing Their Benefits*, N.Y. TIMES (June 4, 2020), https://www.nytimes.com/2020/06/04/us/virus-unemployment-fired.html.

10. *See Lost on the Frontline*, GUARDIAN, https://www.theguardian.com/us-news/ng-interactive/2020/aug/11/lost-on-the-frontline-covid-19-coronavirus-us-healthcare-workers-deaths-database (last visited Oct. 8, 2021). The evidence is reflected in the toll of COVID-19. *Id.* In the first year of the pandemic, the virus claimed the lives of 3,607 healthcare workers in the United States. *Id.*; *see also* Jim Salter & Leah Willingham, *Teacher Deaths from COVID-19 Raise Alarms as New School Year Begins*, PBS (Sep. 9, 2020) (reporting that thirty-one teachers were among seventy-five people employed by the New York City Department of Education who died due to COVID-19 in the early phase of the disease); Lam, *supra* note 3 (reporting that as of November 2020, the United Food and Commercial Workers said that at least 109 grocery workers in the union had died from COVID-19).

11. N.Y. State Nurses Ass'n v. Montefiore Hosp., 457 F. Supp. 3d 430, 430–31 (S.D.N.Y. 2020) (summarizing the New York State Nurses Association's injunction to order defendant hospital to provide respirators, other personal protective equipment, and rapid-response COVID-19 tests as necessary work precautions). Ironically, the fact that nurses had a union along with a collective bargaining agreement meant that their labor dispute could only go to arbitration. *Id.* at 434.

12. Rural Cmty. Workers All. v. Smithfield Foods, Inc., 459 F. Supp. 3d 1228, 1232, 1234 (W.D. Mo. 2020) (deciding whether injunctive relief was appropriate for workers against a meatpacking plant that became a major COVID-19 hot spot due to failure to maintain safe practices such as social distancing, handwashing, masking, and use of sick leave policy); *see also* Fernandez v. Tyson Foods, Inc., 509 F. Supp. 3d 1064, 107–71 (N.D. Iowa 2020) (hearing decedent employee's estate's lawsuit against meat processing company arising out of the employer's alleged inadequate safety procedures and omissions related to COVID-19 pandemic workplace safety).

stores,[13] public transit,[14] rail freight,[15] restaurants and bars,[16] correctional facilities,[17] fulfillment centers,[18] and schools[19] have put their workers in this vice.

My study investigates rulings from courts and agencies involving employees who refused to work when they believed their work assignment posed a risk of death or serious injury.[20] My research poses these questions:

1. What occupations are most frequently involved in these cases?[21] What specific risks of fatality or serious harm arise in these cases?[22] What consequences do workers face for disobeying a work order in these circumstances?[23]

2. What statutes apply in these situations?[24] How do federal and state

13. Warner v. United Nat. Foods, Inc., 513 F. Supp. 3d 477, 480–81 (M.D. Pa. 2021) (involving a food distribution worker who alleged "that he was wrongfully terminated in retaliation for his complaint to the Department of Health" or, alternatively, that he was wrongfully terminated for missing work as he waited for the result of his COVID-19 test after he self-isolated at home with symptoms of the virus).

14. *See* Winnie Hu & Nate Schweber, *'I'm Miserable': Why the Wait for the Subway Feels Longer Than Ever*, N.Y. TIMES (July 13, 2021), https://www.nytimes.com/2021/07/13/nyregion/nyc- subway-delays-worker-shortage.html (noting that COVID-19 has killed at least 168 New York City workers).

15. Union Pac. R.R. Co. v. Bhd. of Maint. of Way Emp. Div. of Int'l Bhd. of Teamsters, 509 F. Supp. 3d 1117, 1121–22 (D. Neb. 2020) (referencing a petition filed by several rail unions to seek an emergency work safety order from the Federal Railroad Administration (FRA)). The FRA did not issue an order but simply issued a "Safety Advisory" that encouraged railroads to abide by Centers for Disease Control and Prevention guidelines. *Id.*

16. Massey v. McDonald's Corp., No. 20 CH 4247, 2020 WL 5700874, at *1 (Ill. Cir. Ct. June 24, 2020) (seeking an injunction in response to inadequate steps by McDonald's to contain the virus, such as providing adequate protective equipment, hand sanitizer, and safety training for employees, or enforcing safety protocols).

17. Arnold v. Corecivic of Tenn., LLC, No. 20-CV-0809 W (MDD), 2021 WL 63109, at *1–2 (S.D. Cal. Jan. 6, 2021) (hearing plaintiff correctional officer's allegation that he was forced to quit due to his employer's failure to take measures to provide a workplace that adequately dealt with health risks from COVID-19).

18. Palmer v. Amazon.com, Inc., 498 F. Supp. 3d 359, 364–65 (E.D.N.Y. 2020) (deciding whether Amazon failed to adhere to state labor regulations and create safe working conditions for its warehouse employees by not providing adequate safeguards against the transmission of COVID-19).

19. Salter & Willingham, *supra* note 10, at 105.

20. *See infra* Part II.

21. *See infra* Table 1.

22. *See infra* Table 1.

23. *See infra* Table 1.

24. *See infra* Sections II.A.1, II.B.1 (discussing the pertinent statutes in work refusal litigation).

statutes apply to specific industries and work settings?[25] How do these laws differ in recognizing a worker's right to refuse a work order on grounds of personal safety?[26]

3. What common law causes of action apply in these situations—for example, the tort of wrongful discharge?[27]

4. How often do workers prevail in these cases?[28] How do rulings in favor of workers vary by statutes and by common law actions?[29] Are workers more successful under federal or state laws?[30]

My inquiry begins in Part II with an overview of federal and state statutes and common law doctrines that employees have used to offer legal justifications to refuse work directives.[31]

In Section III.A, I explain my research methodology.[32] Section III.B presents my data in a series of tables and distils fact findings from the empirical results.[33]

Part IV provides interpretations of my findings.[34] I examine cases—their facts and court or agency rulings—that provide specific contexts to understand the data.[35]

Part V presents my conclusions.[36] Federal and state work refusal laws are out of date in today's workplace.[37] They provide some legal protection against employer retaliation for work refusal in mines, on construction sites, and in trucking.[38] However, prior to COVID-19 these laws provided meager benefits to employees who refused to work when risks involved chemicals, radiation,

25. *See infra* Table 4.A.
26. *See infra* Sections II.A.1, II.B.1 (noting the varying levels of protection provided by federal and state work refusal laws).
27. *See infra* Sections II.A.2, II.B.2.
28. *See infra* Table 2.A.
29. *See infra* Table 1.
30. *See infra* Table 1.
31. *See infra* Part II.
32. *See infra* Section III.A.
33. *See infra* Section III.B.
34. *See infra* Part IV.
35. *See infra* Part IV.
36. *See infra* Part V.
37. *See infra* Part V.
38. *See infra* notes 203–19 and accompanying text.

cedar dust, and other microscopic or invisible hazards.[39]

Special legislation for work refusal during COVID-19 is leading to somewhat better outcomes for frontline workers who are facing unmitigated exposure to the virus, but the initial win rate is essentially fifty-fifty between employees and their employers.[40] In any event, this legislation has expired, except for an obscure tax credit to employers who offer paid sick leave to employees who meet COVID-19 eligibility standards.[41]

I conclude in Part V with policy suggestions.[42] First, the Americans with Disabilities Act could be amended to legislate an employee right to wear a mask at work unless the employer proves, under the statute, that this is an undue hardship.[43] Second, an Occupational Safety and Health Administration (OSHA) rule that provides a narrow right of work refusal could be broadened to include not only hazards that pose immediate physical safety threats[44] but also invisible exposures that are associated with cancer and other life-threatening conditions.[45] Third, to remedy the gender bias in work refusal laws that protect miners, construction workers, and truck drivers, I suggest that sexual and racial assaults—covered by Title VII of the 1964 Civil Rights Act—be treated as protected forms of work refusal when employees quit to avoid these assaults.[46] Fourth, I point out that while gig work is growing, government surveys fail to include gig workers in an annual census of workplace injuries because these workers are not formally designated as employees.[47] I suggest that legislation be considered to extend current work refusal protections to gig workers.[48]

Part VI is an Appendix of the cases listed by federal and state court opinions.[49]

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39. *See infra* notes 220–29 and accompanying text.
40. *See infra* Table 5B.
41. *See infra* note 98 and accompanying text.
42. *See infra* notes 296–325 and accompanying text.
43. *See infra* notes 297–301 and accompanying text.
44. *See infra* note 307 and accompanying text.
45. *See infra* Part V.
46. *See infra* notes 316–19 and accompanying text.
47. *See infra* notes 290–95 and accompanying text.
48. *See infra* notes 320–22 and accompanying text.
49. *See infra* Part VI.

II. A TYPOLOGY OF WORK REFUSAL SAFETY LAWS

Employment-at-will, a common law doctrine, provides employers freedom to end an employment relationship.[50] This doctrine eroded with the advent of discrimination laws that specified unlawful grounds for terminating a person's employment.[51] A right of work refusal is also contextualized outside of safety laws.[52] Unemployment laws generally disqualify claimants who leave work voluntarily[53] or engage in misconduct.[54] My research shows, however, that some administrative agencies[55] and courts[56] treat work refusal due to personal safety concerns as valid claims for unemployment.[57] Also, courts have developed a workplace tort called wrongful discharge[58] and have fashioned a narrow doctrine—called the "public policy exception to employment at will"—that affords legal protection to employees who refuse to violate a

50. *See* H. G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT §134, at 272 (1877) ("With us the rule is inflexible, that a general or indefinite hiring is prima facie a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof . . . . [I]t is an indefinite hiring and is determinable at the will of either party, and in this respect there is no distinction between domestic and other servants."). For a common law example, see Payne v. W. & Atl. R.R. Co., 81 Tenn. 507, 519–20 (1884) ("Railroad corporations have in this matter the same right enjoyed by manufacturers, merchants, lawyers[,] and farmers. All may dismiss their employ[e]es at-will, be they many or few, for good cause, for no cause[,] or even for cause morally wrong, without being thereby guilty of legal wrong . . . . They have the right to discharge their employe[e]s. The law cannot compel them to employ workmen, nor to keep them employed.").

51. *See* Pugh v. See's Candies, Inc., 171 Cal. Rptr. 917, 920 (1981). "In recent years, there have been established by statute a variety of limitations upon the employer's power of dismissal. Employers are precluded, for example, from terminating employees for a variety of reasons, including union membership or activities, race, sex, age[,] or political affiliation." *Id.*

52. *See* Jones v. Illinois Dep't of Emp. Sec., 657 N.E.2d 1141, 1144 (1995) ("[S]ection 601(A) provides that 'an individual shall be ineligible for benefits because he left work voluntarily without good cause attributable to the employing unit.'").

53. Burke v. Bd. of Rev., 477 N.E.2d 1351, 1358 (Ill. Ct. App. 1985).

54. *See infra* notes 114–19 and accompanying text.

55. *See* Odyssey Cap. Grp., L.P., 337 N.L.R.B. 1110 (2002) (detailing a decision by the National Labor Relations Board regarding three apartment maintenance workers who refused work due to concerns about airborne asbestos and engaged in concerted activity).

56. *See infra* note 112 and accompanying text (holding that claimant's actions did not constitute misconduct as he had an objectively reasonable belief that his assignment endangered his life and safety).

57. *See Odyssey*, 337 N.L.R.B. at 1116.

58. *See infra* notes 124–28 and accompanying text.

law,[59] or who report a violation of a law.[60] I show how these cases arise in certain work refusal situations.[61] For the discussion in Section II.A, Chart A explicates the main features of federal and state work refusal statutes.[62]

Chart A: Typology of Work Refusal Laws		
	Statute	Common Law
Federal	1. General Regulation • Occupational Safety and Health Act, 29 C.F.R. 1977.12(b)(2) (2020) (private and public sector) • National Labor Relations Act, as amended by the Labor Management Relations Act, June 23, 1947, ch.120, 61 Stat. 156, codified at 29 U.S.C. §143 (private sector) • The Families First Coronavirus Response Act, Pub. L. No. 116-127 (2020), including the Emergency Paid Sick Leave Act, 29 C.F.R. § 826.20 (2020) Industry Regulation • The Federal Mine Safety and Health Act of 1977, Pub. L. No. 95-164 (1977) • Federal Railroad Safety Act, 49 U.S.C. §20109 (1994) • Protection of Seamen Against	3. Judicial Review of Labor Arbitration Rulings • Steelworkers Trilogy (United Steelworkers of American v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564 (1960); and United Steelworkers of America. v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960))

59. Borden v. Amoco Coastwise Trading Co., 985 F. Supp. 692 (S.D. Tex. 1997).
60. Dicomes v. State, 782 P.2d 1002, 1007 (Wash. 1989).
61. *See infra* Section III.B.5 and accompanying text.
62. *See infra* Section II.A.

	Discrimination, 46 U.S.C. § 2114(a)(1)(B) • Surface and Transportation Assistance Act of 1982, Pub. L. 97–424, 96 Stat. 2097	
State	2. General Regulation • Michigan Occupational Health and Safety Act, M.C.L. § 408.1001 (1975) • CAL. LAB. CODE § 6311 (West 1973) • WASH. ADMIN. CODE § 296-360-150 (1980) • State Unemployment Insurance (disqualification standards)	4. Unjust Dismissal/Wrongful Discharge • Tort (Public Policy Exception to Employment-at-Will)

A. Federal Work Refusal Laws

1. Statutes

National Labor Relations Act (NLRA), as Amended by the Labor Management Relations Act (LMRA). In 1947, Congress amended the National Labor Relations Act by passing the Labor Management Relations Act, also called the Taft–Hartley Act.[63] While the statute enacted limits on strikes,[64] it carved out an exception in Section 502 for an employee's refusal to work under dangerous conditions.[65] The law states:

> Nothing in this chapter shall be construed to require an individual employee to render labor or service without his

63. National Labor Relations Act, *amended by* Labor Management Relations (Taft–Hartley) Act, ch. 120, 61 Stat. 136 (codified as amended in scattered sections of 29 U.S.C.); *see supra* Chart A, Cell 1.

64. 29 U.S.C. § 158(d)(4) (prohibiting strikes unless notice of intent to strike occurs and time limits are met).

65. *Id.*

> consent . . . nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this chapter.[66]

In vague terms, Section 502 regulates work refusal by employees who are subject to abnormally dangerous conditions.[67] Nonetheless, the scope of this privilege is unclear because "abnormally dangerous conditions" and "quitting . . . in good faith" are ambiguous.[68] Federal courts have done little to clarify these terms.[69] In *Gateway Coal Co. v. United Mine Workers of America*, the Supreme Court stated in dictum that a Section 502 work stoppage is protected only when a union presents "ascertainable, objective evidence . . . that an abnormally dangerous condition for work exists."[70] Cases arise infrequently under Section 502.[71]

Occupational Safety and Health Act. Congress passed the Occupational Safety and Health (OSH) Act of 1970 "to assure so far as possible every working man and woman in the [n]ation safe and healthful working conditions."[72] The Act encourages employers and employees to reduce workplace hazards and provides procedures for reporting occupational safety and health concerns to OSHA.[73] The purpose of the OSH Act is to prevent and abate hazards in

66. *Id.*

67. *Id.*

68. *Id.*

69. *See infra* Part V.

70. *See, e.g.*, Gateway Coal Co. v. United Mine Workers of Am., 414 U.S. 368, 386–87 (1974). The Court was confronted with the issue of whether there is federal jurisdiction to enjoin a safety strike and compel arbitration of a union's complaint about abnormally dangerous working conditions. *Id.* Although the Court ruled that the dispute was arbitrable under the labor agreement, it stated in dictum its view that a Section 502 work stoppage is protected only when a union presents "ascertainable, objective evidence . . . that an abnormally dangerous condition for work exists." *Id.* at 387.

71. *See, e.g.*, Airborne Freight Corp. v. Int'l Bhd. of Teamsters Loc. 705, 216 F. Supp. 2d 712, 713–16 (N.D. Ill. 2002) (involving union-represented employees who engaged in a safety strike that lasted several hours over a supervisor who displayed racist attitudes and battered a worker, as well as the employer's denial of water to workers during a hot day); Odyssey Cap. Grp., L.P., 337 N.L.R.B. 1110, 1114–17 (2002) (concerning three apartment maintenance workers who refused work due to concerns about airborne asbestos and engaged in concerted activity).

72. 29 U.S.C. § 651(b).

73. 29 U.S.C. § 651(b)(1), (10).

the workplace.[74] Thus, the law provides a broad scope of worker safety rights.[75]

The OSH Act prohibits employers from retaliating or otherwise discriminating against employees for exercising safety rights, including reporting or testifying in connection to their complaint.[76] More specifically, the law provides to employees a sequence of procedures when they confront imminently dangerous work conditions: a right to request an OSHA inspection,[77] to assist in this inspection,[78] to participate in a judicial proceeding,[79] and to bring an action to compel the Secretary of Labor to enforce the OSH Act.[80] In 1973, the Secretary of Labor promulgated a work refusal rule that added to this sequence of employee reporting of potentially deadly working conditions.[81] In the event that employee reporting was futile, this rule stated narrow conditions for an employee to refuse an assigned task because of a reasonable apprehension of death or serious injury.[82] The Supreme Court upheld the rule as a valid

74. *See* Reich v. Hoy Shoe Co., 32 F.3d 361, 368 (8th Cir. 1994).

75. *See* 29 C.F.R. § 1977.12 (2020) (discussing conduct explicitly and implicitly protected under the OSH Act); 29 C.F.R. § 1904.36 (2020) (prohibiting retaliation for reporting workplace injury).

76. *See* 29 U.S.C.A § 660(c) (prohibiting discrimination against an employee for exercising rights under OSH Act).

77. 29 U.S.C. § 657(f)(1).

78. 29 U.S.C. § 657(a)(2), (e), (f)(2).

79. 29 U.S.C. § 660(c)(1).

80. 29 U.S.C. § 662(d).

81. 29 C.F.R. § 1977.12 (2020).

82. The rule is stated in 29 C.F.R. § 1977.12(b)(2):

> However, occasions might arise when an employee is confronted with a choice between not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace. If the employee, with no reasonable alternative, refuses in good faith to expose himself to the dangerous condition, he would be protected against subsequent discrimination. The condition causing the employee's apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels. In addition, in such circumstances, the employee, where possible, must also have sought from his employer, and been unable to obtain, a correction of the dangerous condition.

Id. at § 1977.12(b)(2).

exercise of authority under the OSH Act.[83]

The Federal Mine Safety and Health Act of 1977. A massive explosion killed seventy-eight West Virginia coal miners in 1968.[84] This led to passage of the Federal Coal Mine Health and Safety Act (CMHSA or Coal Act).[85] The CMHSA contained a nondiscrimination provision for miners who refused work once they notified their supervisor of a dangerous working condition.[86] In 1977, Congress amended the CMHSA and titled it the Federal Mine Safety and Health Amendments Act of 1977 (FMSHA or Mine Act).[87]

This law's main purpose is to protect coal miners.[88] The Mine Safety and Health Administration (MSHA), an agency within the Department of Labor, enforces the law.[89] The Mine Act affords protection to miners who refuse to

83. Whirlpool Corp. v. Marshall, 445 U.S. 1, 3–4, 22 (1980) ("[A]mong the rights that the Act so protects is the right of an employee to choose not to perform his assigned task because of a reasonable apprehension of death or serious injury coupled with a reasonable belief that no less drastic alternative is available."); Donovan v. Com. Sewing, Inc., 562 F. Supp. 548, 553 (D. Conn. 1982) (involving an employee who experienced headaches and nausea when exposed to a type of glue used by the employer for a project and, after asking about the glue's contents, left work early and was then wrongfully discharged).

84. S. REP. NO. 91-411, at 6 (1969), *reprinted in* S. COMM. ON LABOR & PUBLIC WELFARE, 91ST CONG., LEGISLATIVE HISTORY OF THE FEDERAL COAL MINE HEALTH AND SAFETY ACT OF 1969, at 132 (1978).

85. The Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 742 (codified at 30 U.S.C. §§ 801-960 (1970), *as amended* (Supp. V, 1975)). See also Section 105(c)(1) of the Federal Coal Mine Health and Safety Act, 30 U.S.C. § 815(c)(1).

86. The Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 742 (codified at 30 U.S.C. §§ 801-960 (1970), *as amended* (Supp. V, 1975)). Section 110(b) of the 1969 Federal Coal Mine Health and Safety Act included a nondiscrimination provision for miners when notifying the Secretary or his authorized representative of any alleged violation or danger. *Id.* At least two appellate court opinions viewed this language as protecting miners from discharge if they notified their supervisor of an unsafe condition and refused to work. *See* Phillips v. Interior Bd. of Mine Operations Appeals, 500 F.2d 772, 779 (D.C. Cir. 1974); Munsey v. Morton, 507 F.2d 1202, 1205 (D.C. Cir. 1974).

87. Federal Mine Safety and Health Act of 1977 (Mine Act), Pub. L. No. 95–164, 91 Stat. 1290.

88. S. REP. NO. 95-181, (1977), *as reprinted in* 1977 U.S.C.C.A.N. 3401, 3417.

> Under this legislation, operators would have the duty to furnish miners places of employment which are free from recognized hazards that are causing or likely to cause death or harm to miners . . . . The purpose is to require the elimination of recognized hazards that are not specifically covered by a standard.

Id.

89. Mine Safety and Health Administration, 29 U.S.C. § 557(a).

work because of hazardous conditions.[90] Its legislative history reflected an understanding that the right to refuse unsafe work was "essential," and therefore the law provided "[t]he right to refuse work under conditions that a miner believes in good faith to threaten his health and safety."[91]

The Surface Transportation Assistance Act of 1982. The Surface Transportation Assistance Act (STAA) was enacted in 1982 as part of a comprehensive infrastructure funding law.[92] The law contained legal protections against retaliation and discrimination for employees in trucking and related occupations when the employee has a good faith belief that working conditions present "reasonable apprehension of serious injury to the employee or

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90. *See id.*

91. 123 CONG. REC. 20,043 (1977). *See generally* S. REP. NO. 95–181, at 35–36 (1977), *reprinted in* S. SUBCOMM. ON LABOR OF THE COMM. ON HUMAN RESOURCES, 95TH CONG., LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, at 623–24 (1978). The record states:

> MR. CHURCH. I wonder if the distinguished chairman would be good enough to clarify a point concerning section 10[5](c), the discrimination clause.
> It is my impression that the purpose of this section is to [e]nsure that miners will play an active role in the enforcement of the act by protecting them against any possible discrimination which they might suffer as a result of their actions to afford themselves . . . the protection of the act.
> It seems to me that this goal cannot be achieved unless miners faced with conditions that they believe threaten their safety or health have the right to refuse to work without fear of reprisal. Does the committee contemplate that such a right would be afforded under this section?
>
> MR. WILLIAMS. The committee intends that miners not be faced with the Hobson's choice of deciding between their safety and health or their jobs.
> The right to refuse work under conditions that a miner believes in good faith to threaten his health and safety is essential if this act is to achieve its goal of a safe and healthful workplace for all miners.
>
> MR. JAVITS. I think the chairman has succinctly presented the thinking of the committee on this matter. Without such a right, workers acting in good faith would not be able to afford themselves their rights under the full protection of the act as responsible human beings.

Id. at 1088–89; *see also* Miller v. FMSHRC, 687 F.2d 194, 195 (7th Cir.1982) ("[S]o clear a statement in the principal committee report is powerful evidence of legislative purpose.").

92. *See* Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, 96 Stat. 2097; *see also* U.S. GOV'T ACCOUNTABILITY OFF., GAO-84-2, THE SURFACE TRANSPORTATION ASSISTANCE ACT OF 1982: COMPARATIVE ECONOMIC EFFECTS ON THE TRUCKING INDUSTRY i (1984), https://www.gao.gov/assets/150/141354.pdf (containing a succinct explanation of the STAA).

the public because of the vehicle's hazardous safety or security condition."[93]

Federal Railroad Safety Act. Congress enacted the Federal Railroad Safety Act (FRSA) "to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents."[94] The law prohibits railroads from discriminating against employees for engaging in safety-related activities.[95] The law applies to employees who have a good faith belief that work presents conditions of imminent death or serious injury.[96]

Families First Coronavirus Response Act. The Families First Coronavirus Response Act (FFCRA) was enacted shortly after the COVID-19 pandemic emerged in the United States.[97] It contained the Emergency Paid Sick Leave Act (EPSLA), a law that has been invoked in situations where an employee delayed work or refused work due to personal health concerns related to the virus.[98] The EPSLA provided paid leave for a variety of personal and family reasons, including provisions that pertained specifically to the health of the employee:

> (1) An Employer shall provide to each of its Employees Paid Sick Leave to the extent that Employee is unable to work due to any of the following reasons: (i) [t]he Employee is subject to a [f]ederal, [s]tate, or local quarantine or isolation order related to COVID-19; (ii) [t]he Employee has been advised by a [healthcare] provider to self-quarantine due to concerns

93. 49 U.S.C. § 31105(a)(1)(B)(ii). In *Brock v. Roadway Express, Inc*., the Supreme Court observed that Section 405 of the STAA "protects employees in the commercial motor transportation industry from being discharged in retaliation for refusing to operate a motor vehicle that does not comply with applicable state and federal safety regulations or for filing complaints alleging such noncompliance." Brock v. Roadway Express, Inc., 481 U.S. 252, 255 (1987).

94. 49 U.S.C. § 20101.

95. 49 U.S.C. § 20109(a).

96. 49 U.S.C. § 20109(b)(1)(B). A railroad carrier may not "discharge, demote, suspend, reprimand, or in any other way discriminate against an employee for . . . refusing to work when confronted by a hazardous safety or security condition related to the performance of the employee's duties" if certain prerequisite conditions exist. *Id.* Work refusal is only protected when an employee has a good faith belief that "the hazardous condition presents an imminent danger of death or serious injury," "the urgency of the situation does not allow sufficient time to eliminate the danger without such refusal," and the employee has notified the railroad of the hazard. 49 U.S.C. § 20109(b)(2).

97. *See* Families First Coronavirus Response Act, PUB. L. NO. 116-127 (2020).

98. 29 C.F.R. § 826.20(a)(1) (2020) (listing situations where an employee can get paid sick leave) (expired 2020).

> related to COVID-19; (iii) [t]he Employee is experiencing symptoms of COVID-19 and seeking medical diagnosis from a [healthcare] provider; . . . or (vi) [t]he Employee has a substantially similar condition as specified by the Secretary of Health and Human Services, in consultation with the Secretary of the Treasury and the Secretary of Labor.[99]

Under the EPSLA, a qualifying full-time employee was entitled to a maximum of eighty hours of paid sick leave.[100] The emergency law also prohibited an employer "from discharging, disciplining, or discriminating against" an individual who took paid sick leave.[101] Notably, however, the law expired on December 31, 2020.[102]

2. Common Law

When union-represented employees refuse to work, employers may see this as an unauthorized work stoppage.[103] Traditionally, collective bargaining agreements (CBAs) have included union assurances that they will not strike in exchange for access to arbitration.[104] As a result of Supreme Court precedent, a federal common law has evolved in interpreting labor agreements.[105]

99. 29 C.F.R. § 826.20(a)(1) (2020).

100. 29 C.F.R. § 826.21(a)(1) (2020).

101. 29 C.F.R. § 826.150(a) (2020) (including Prohibited Acts and Enforcement under the EPSLA).

102. *Families First Coronavirus Response Act: Questions and Answers*, U.S. DEP'T OF LAB., https://www.dol.gov/agencies/whd/pandemic/ffcra-questions (last visited Oct. 25, 2021) ("The requirement that employers provide paid sick leave and expanded family and medical leave under the Families First Coronavirus Response Act (FFCRA) expired on Dec. 31, 2020.").

103. *See, e.g.*, Gateway Coal Co. v. United Mine Workers of Am., 414 U.S. 368, 372 (1974) (involving a coal company that viewed miners' refusal to work until air flow returned to normal as an unauthorized strike under the collective bargaining agreement).

104. *See* ARCHIBALD COX, DEREK CURTIS BOK, ROBERT A. GORMAN & MATTHEW W. FINKIN, LABOR LAW: CASES AND MATERIALS 717 (13th ed. 2001) (reporting that arbitration provisions reflecting this bargained exchange appear in about ninety-six percent of all labor agreements). Reflecting on Section 301 of the LMRA, Justice Douglas remarked in *Textile Workers Union of America v. Lincoln Mills of Alabama*, "Plainly the agreement to arbitrate grievance disputes is the quid pro quo for an agreement not to strike." 353 U.S. 448, 455 (1957).

105. *See* United Steelworkers of Am. v. Am. Mfg. Co., 363 U.S. 564, 567 (1960) ("In our role of developing a meaningful body of law to govern the interpretation and enforcement of collective bargaining agreements, we think special heed should be given to the context in which collective bargaining agreements are negotiated and the purpose which they are intended to serve.").

This body of precedent includes the *Steelworkers Trilogy*,[106] a series of rulings that announced principles of judicial deference to the arbitration process as well as the awards rendered by labor arbitrators.[107] As Chart A, Cell 3 shows, some work refusal cases arise under this body of federal common law.

B. State Work Refusal Laws

1. Statutes

In Chart A, state safety statutes are summarized in Cell 2, while the primary common law element in work refusal cases is shown in Cell 4. The following discussion provides elaboration.

State Work Safety Statutes. Some states have work safety laws that are patterned after federal laws.[108] These laws cover mine safety,[109] public sector employee safety,[110] specific workplace hazards,[111] as well as more general supplements to federal OSHA regulations.[112] State laws protect certain forms

106. *See* United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581 (1960); United Steelworkers of Am. v. Am. Mfg. Co., 363 U.S. 564, 567 (1960); United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 593, 598 (1960).

107. *See Enter. Wheel*, 363 U.S. at 596 ("The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards.").

108. *See Cal/OSHA*, CAL. DEP'T OF INDUS. REL., https://www.dir.ca.gov/dosh/ (last visited Oct. 10, 2021) (providing an example of California's work safety laws, which are patterned after federal laws).

109. *See, e.g.*, Coal Mining Act, 225 ILL. COMP. STAT. 705 (2009); Mining Safety Standards, 805 KY. ADMIN. REGS. 3 (2021); 52 PA. CONS. STAT. § 69.207(a) (1991); Coal Mine Safety Act, VA. CODE ANN. § 45.1-161.7 (repealed 2021); Miners' Health, Safety and Training, W. VA. CODE § 22A (1994).

110. *See, e.g.*, Safety and Health Standards for Public Employees, N.Y. LAB. LAW § 27-a (Consol. 2021).

111. *See, e.g.*, Puffer's Hardware, Inc. v. Donovan, 742 F.2d 12, 14–15 (1st Cir. 1984) (discussing a Massachusetts statute regulating elevator doors to increase safety); *see also* Env't Encapsulating Corp. v. City of New York, 666 F. Supp. 535, 537 (S.D.N.Y. 1987) (reviewing City of New York's asbestos handling regulations), *rev'd in part*, 855 F.2d 48 (2d Cir. 1988); Associated Builders v. Miami-Dade County, 534 F.3d 1321, 1321–22 (11th Cir. 2010) (reviewing a Florida ordinance that mandated wind load standards).

112. *See, e.g.*, Division of Occupational Safety and Health, CONN. GEN. STAT. ANN. § 31-368 (West 2017); Michigan Occupational Health and Safety Act, MICH. COMP. LAWS § 408.1001–.1085(a) (1974); Oregon Safe Employment Act, OR. REV. STAT. § 654.001–.295, .412–.423, .750–.780, .991

of work refusal due to safety concerns.[113]

Unemployment Statutes. State unemployment insurance programs are funded through coordination with federal policies.[114] Their purpose is "reducing the hardship of unemployment."[115] Claims are generally allowed for "persons who become unemployed through no fault of their own."[116] However, when unemployment results from a person's misconduct, a state has grounds to deny a claim for benefit.[117] Some states limit these grounds for disqualification to "wrongful intent or evil design,"[118] while others broaden misconduct standards to include employee dishonesty.[119]

These standards for voluntary quitting and misconduct create ambiguity

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(1973).

113. *See, e.g.*, Mangini v. Penske Logistics, No. 11-0270 (NLH/KMW), 2012 WL 4609890, at *4 (D.N.J. Sept. 28, 2012) (discussing the allowance of work refusal for safety reasons under New Jersey Conscientious Employee Protection Act); Lee v. Ardagh Glass, Inc., No. 14-cv-0759, 2015 WL 251858, at *5 (E.D. Cal. Jan. 20, 2015) (hearing an argument that an employer violated the California Labor Code by terminating an employee for refusing to work when he felt unsafe); Hartnett v. New York City Transit Auth., 657 N.E.2d 773, 773 (N.Y. 1995); Davis v. Kitt Energy Corp., 365 S.E.2d 82, 86 (W. Va. 1987).

114. Jenkins v. Bowling, 691 F.2d 1225, 1228 (7th Cir. 1982) offers a succinct summary of the federal–state relationship in unemployment insurance:

> Though administered at the state level in accordance with criteria for eligibility largely determined by each state, unemployment insurance is partly financed by the federal government, which naturally has attached some strings to its largesse. The two strings that are relevant to this case are [S]ections 303(a)(1) and (3) of the Social Security Act, 42 U.S.C. §[] 503(a)(1), (3).

Id.

115. Gibson v. Unemployment Ins. Appeals Bd., 509 P.2d 945, 948 (Cal. 1973).

116. Jones v. Ill. Dep't of Emp. Sec., 657 N.E.2d 1141, 1144 (Ill. App. Ct. 1995) ("[S]ection 601(A) provides that '[a]n individual shall be ineligible for benefits [because] he left work voluntarily without good cause attributable to the employing unit.'" (quoting 820 ILL. COMP. STAT. 405/601(A) (1992))).

117. *See, e.g.*, IOWA CODE ANN. § 96.5(2) (West 2020) (stating that individuals are disqualified from receiving unemployment benefits if they were discharged for misconduct).

118. Jackson v. Bd. of Rev. of the Dep't of Lab., 475 N.E.2d 879, 885 (Ill. 1985) ("'[M]isconduct' . . . is limited to conduct evincing such wi[l]lful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent[,] or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer." (quoting Boynton Cab Co. v. Neubeck, 296 N.W. 636, 640 (Wis. 1941))).

119. Johnson v. Unemployment Appeals Comm'n, 680 So. 2d 1073, 1073 (Fla. Dist. Ct. App. 1996) ("[D]ishonesty is and should be grounds for dismissal and denial of benefits . . . .").

for certain work refusal cases.[120] Employers object to payment of claims on grounds that an employee quit work and was therefore ineligible.[121] In other cases, employers object to payment of claims on grounds that the employee engaged in misconduct related to loss of their job.[122] A new rule by President Biden's Administration, which sets standards for funding unemployment insurance programs, disallows employer objections to claims when an employee is fired for actions related to avoiding COVID-19.[123]

120. *See id*.; *Jackson*, 475 N.E.2d at 885.

121. *See* Long v. Traughber, No. 1380, 1991 WL 25917, at *1, *3 (Tenn. Ct. App. Mar. 4, 1991) (reversing denial of a terminated employee's claim for unemployment benefits for allegedly voluntarily quitting, stating: "[W]e cannot agree that the appellant's refusal to work amounted to a wrongdoing which violated a duty owed to his employer, nor can we agree that the appellant's refusal to work at the Oak Ridge site constituted a voluntary termination of employment. An employee's obligation and duty is to work at a time and a place where he is called upon to work by his employer[;] however, there is a corollary duty on the part of the employer to provide working conditions which are not dangerous or detrimental to health."). The employer had terminated the employee for refusing to return to a work site due to concern regarding radiation exposure. *Id.* at *1.

122. *See* Miss. Emp. Sec. Comm'n v. Phillips, 562 So. 2d 115, 116 (Miss. 1990) (ruling that an employee who was discharged for refusing to work on a potential blow-out on an Exxon oil drilling rig in the Gulf of Mexico held an objectively reasonable belief that the assignment endangered his life and safety, thus his "actions did not constitute misconduct," and he was entitled to unemployment benefits).

123. *See* EMP. & TRAINING ADMIN. ADVISORY SYS., DEP'T OF LAB., LETTER NO. 16-20, CHANGE 5, UNEMPLOYMENT INSURANCE PROGRAM (2021), https://wdr.doleta.gov/directives/attach/UIPL/UIPL_16-20_Change_5.pdf ("[T]he Department hereby establishes additional COVID-19 related reasons under which an individual may self-certify to establish eligibility for [Pandemic Unemployment Assistance (PUA)]. These additional COVID-19 related reasons are described below . . . . [They include individuals] who refuse to return to work that is unsafe or accept an offer of new work that is unsafe."). The U.S. Department of Labor is issuing guidance to state unemployment insurance agencies that expands the number of instances in which workers may be eligible for PUA. *Id.* The Department of Labor stated that a person could self-certify under this COVID-19 related reason:

> The individual has been denied continued unemployment benefits because the individual refused to return to work or accept an offer of work at the worksite that, in either instance, is not in compliance with local, state, or national health and safety standards directly related to COVID-19. This includes, but is not limited to, those related to facial mask wearing, physical distancing measures, or the provision of personal protective equipment consistent with public health guidance.

Id.

2. Common Law

In general, states recognize employment-at-will, which grants an employer the right to discharge an employee for any reason or no reason.[124]

However, most states provide a common law exception for the tort of wrongful dismissal.[125] This includes torts for wrongful discharge when an employee's termination violates a public policy.[126] This tort stems from an employer's common law duty to provide a safe workplace.[127] A separate tort exists for exercising a statutory right to report a safety problem that imperils an employee's safety.[128]

III. RESEARCH METHODS AND FINDINGS

Section III.A explains the methodology for this study. Section III.B presents findings in five stages: (1) the sample and its primary characteristics followed by fact findings; (2) total rulings won by employees and by

124. *See, e.g.*, Gardner v. Loomis Armored Inc., 913 P.2d 377 (Wash. 1996) ("Under the common law, at-will employees could quit or be fired for any reason."). In recent years, courts have created certain exceptions to the terminable-at-will doctrine. Dicomes v. State, 782 P.2d 1002, 1006 (Wash. 1989). One of these exceptions says employees may not be discharged for reasons that contravene public policy. *Id.* Almost every state has recognized this public policy exception. *Id.* These public policy tort actions have generally been allowed in four different situations: (1) where employees are fired for "refusing to commit an illegal act"; (2) where employees are fired for "performing a public duty or obligation," such as serving on a jury; (3) where employees are fired for exercising "a legal right or privilege," such as filing workers' compensation claims; and (4) where employees are fired in retaliation for reporting employer misconduct, i.e., "whistleblowing." *Id.* at 1007.

125. 1 HENRY H. PERRITT, JR., EMPLOYEE DISMISSAL LAW AND PRACTICE § 1.13–.63, at 26–66 (John Wiley and Sons, Inc., 3d ed.1992) (giving an exhaustive state-by-state survey of wrongful discharge actions).

126. *See* Unger v. City of Mentor, 387 F. App'x 589, 593–94 (6th Cir. 2010) ("To state [a claim for wrongful discharge in violation of public policy], a plaintiff must plausibly allege that: (1) a clear public policy existed, manifested in a state or federal constitution, statute, or administrative regulation (clarity element); (2) dismissing employees under such circumstances would jeopardize the public policy (jeopardy element); (3) conduct related to the public policy motivated the dismissal (causation element); and (4) the employer lacked an overriding legitimate business justification (justification element).").

127. *See* Bailey v. Cent. Vt. Ry., 319 U.S. 350, 352 (1943) (noting that "at common law the duty of the employer to use reasonable care in furnishing his employees with a safe place to work was plain").

128. *See* Kohrt v. MidAmerican Energy Co., 364 F.3d 894, 900, 902 (8th Cir. 2004) (holding that a statutory provision "encouraging employees to work toward high safety standards" creates a public policy against discharging employees for voicing safety concerns).

employers in their first and second rounds of adjudication; (3) a subset of rulings sorted by type of risk of serious injury or death followed by fact findings; (4) a subset of rulings sorted by type of occupation followed by fact findings; and (5) a subset of rulings won by employees and by employers in their first and second rounds of adjudication sorted by law followed by fact findings. Throughout these empirical snapshots, I compare the 109 work refusal rulings prior to COVID-19 and the twelve cases involving work refusal stemming from employee concerns about COVID-19.

A. Research Methods and Sample

I created a database of federal and state rulings from courts and administrative agencies on work refusal disputes. I started my investigation in Westlaw's internet database by using various search combinations with "work" and "refus!". I also used leading cases on work refusal, *Gateway Coal Co. v. United Mine Workers of America*[129] and *Whirlpool Corp. v. Marshall*.[130] In 2021, I applied this method to search for COVID-19 work refusal cases.[131] Once I found appropriate cases, I explored precedents cited by these decisions and keycited cases for additions to my list. Some cases contained more nuanced forms of employee resistance such as delay,[132] objection or complaint,[133] or a strike.[134] These cases were added if work was delayed and

129. 414 U.S. 368, 387 (1974).

130. 445 U.S. 1, 22 (1980).

131. *See infra* Section III.B.

132. *See generally* Robinette, 3 FMSHRC 803 (1981); Leeco, Inc. v. Hays, 965 F.2d 1081 (D.C. Cir. 1992); Mitchell v. TAC Tech. Servs., Inc., 734 N.E.2d 1198 (Mass. App. Ct. 2000).

133. *See generally* Collins v. Fed. Mine Safety & Health Rev. Comm'n, 42 F.3d 1388 (6th Cir. 1994); Wellmore Coal Corp. v. Fed. Mine Safety & Health Rev. Comm'n, 133 F.3d 920 (4th Cir. 1997); Sisk v. Fed. Mine Safety & Health Rev. Comm'n, 878 F.2d 1436 (6th Cir. 1989); Acosta v. Jardon & Howard Techs., Inc., No. 18-CV-16-D, 2018 WL 5779506 (E.D.N.C. Nov. 2, 2018); Perez v. E. Awning Sys., Inc., No. 15-cv-01692, 2018 WL 4926447 (D. Conn. filed Oct. 10, 2018); Perez v. Clearwater Paper Corp., 184 F. Supp. 3d 831 (D. Idaho 2016); Perez v. Lear Corp. Eeds & Interiors & Renosol Seating, LLC, No. 15-0205-CG-M , 2015 WL 2131282, (S.D. Ala. May 7, 2015), *vacated* 822 F.3d 556 (11th Cir. 2016); Perez v. U.S. Postal Serv., 76 F. Supp. 3d 1168, 1173 (W.D. Wash. 2015); Wheeler v. Caterpillar Tractor Co., 485 N.E.2d 372 (Ill. 1985); Hentzel v. Singer Co., 188 Cal. Rptr. 159 (Ct. App. 1982).

134. *See generally* Bos. & Me. Corp. v. Lenfest, 799 F.2d 795, 797 (1st Cir. 1986); Missouri-Kansas-Texas R.R. Co. v. Bhd. of R.R. Trainmen, 342 F.2d 298 (5th Cir. 1965); Atl. Richfield Co. v. Oil, Chem. & Atomic Workers, Int'l Union, AFL-CIO, No. 69 H 256, 1969 WL 326 (N.D. Ind. Dec. 17,

contention arose from the worker's complaint.

I developed a data-coding form for each case. This form had a heading for the case citation, followed by variables such as private-sector or public-sector work, union represented or not, and individual or multiple plaintiffs. I assigned a unique number for these variables (e.g., "1" if the employee was in a union; "2" if the employee was not shown to be in a union; and "3" if the employee was a contract worker in a workplace with union representation).

My data sheet continued with two sections for occupation and work-related risk.[135] To gather data on job types and occupational risks associated with work refusal disputes, I relied on two classifications used by the U.S. Department of Labor Bureau of Labor Statistics (BLS). First, I used the BLS classification for occupations in the agency's reporting of workplace fatalities.[136] BLS sorts occupations according to the following occupational groups: (1) management; (2) business and financial operations; (3) computer and mathematical; (4) architectural and engineering; (5) life, physical, and social science; (6) community and social services; (7) education, training, and library; (8) legal; (9) arts and design; (10) entertainment, sports, and media; (11) healthcare practitioners and technical; (12) healthcare support; (13) protective services; (14) food preparation and serving; (15) building and grounds cleaning and maintenance; (16) personal care and service; (17) sales and related; (18) office and administrative support; (19) farming, fishing, and forestry; (20) construction and extraction; (21) installation, maintenance, and repair; (22) production; and (23) transportation and material moving.[137] I coded cases to match the job of the employee who engaged in work refusal to an occupational group in the BLS survey.[138]

1969), *aff'd*, 447 F.2d 945 (7th Cir. 1971); Phila. Marine Trade Ass'n v. Unemployment Comp. Bd. of Rev., 195 A.2d 138 (Pa. Super. Ct. 1963); Pan Am. World Airways, Inc. v. Air Line Pilots Ass'n, Int'l, 206 N.Y.S.2d 98 (N.Y. Sup. Ct. 1960); E. Gas & Fuel Assocs. v. Unemployment Comp. Bd. of Rev., 63 A.2d 371 (Pa. Super. Ct. 1949).

135. *See infra* Table 1.

136. *TABLE A-5: Fatal Occupational Injuries by Occupation and Event or Exposure, All United States, 2019*, U.S. BUREAU OF LAB. STAT., https://www.bls.gov/iif/oshwc/cfoi/cftb0332.htm (last visited Oct. 11, 2021).

137. *Id.*

138. *Statistics*, U.S. DEP'T OF LAB., https://www.dol.gov/general/topic/statistics (last visited Oct. 11, 2021) (providing that the Bureau of Labor Statistics is the "principal fact-finding agency for the federal government in the field of labor, economics, and statistics" and "[p]rovides data on employment, wages, inflation, productivity, and many other topics").

BLS also classifies risks associated with occupational injuries.[139] The main headings for this survey of risks include (1) violence; (2) transportation; (3) fire and explosion; (4) fall, slip, or trip; (5) exposure to harmful substances; (6) contact with objects or equipment; (7) overexertion or bodily reaction; (8) containers, furniture, and fixtures; (9) machinery; (10) parts and materials; (11) persons, plants, animals, and minerals; (12) structures and surfaces; (13) tools, instruments, and equipment; and (14) other.[140] While most cases had only one risk, some cases had two or more risk factors.[141] I assigned a dominant risk for each case.[142]

I coded results for first-round rulings through fourth-round rulings.[143] I treated an agency ruling the same as a court's ruling.[144] A variable had scores for (1) employee wins all, (2) employee wins part, and (3) employer wins all. Separately, I coded rulings by the winners of procedural motions and the winners of merits rulings.

My coding extended to types of laws raised by employees in work refusal cases, including (1) LMRA, (2) OSH Act, (3) other federal safety laws, (4) state OSH acts, (5) other state safety laws, (6) collective bargaining agreements, (7) unemployment insurance, (8) tort (wrongful discharge), and (9) COVID-19 safety provisions in FFCRA (EPSLA).[145]

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139. *Table 2. Fatal Occupational Injuries for Selected Events or Exposures, 2015–19*, U.S. BUREAU OF LAB. STAT.: ECON. NEWS RELEASE, https://www.bls.gov/news.release/cfoi.t02.htm (last visited Oct. 11, 2021) (identifying violence, transportation, fire and explosion, fall, slip or trip, explosion, exposure to harmful substances, and contact with objects or equipment as broad risk elements).

140. *Id.*

141. *See* Paige v. Henry J. Kaiser Co., 826 F.2d 857, 862 (9th Cir.1987) (involving employees who were discharged after refusing to fill generators with gasoline under unsafe conditions).

142. *See infra* Section III.B.

143. For the small number of cases with more than four rounds of rulings, I counted the most recent ruling as the fourth and worked back three more rulings. *See, e.g.*, Wolfgram v. Emp. Sec. Agency, 291 P.2d 279, 279–82 (Idaho 1955) (ruling the employee was not eligible for unemployment benefits after five rounds of rulings). Thus, in a tiny fraction of cases, a first ruling was actually a ruling based on an appeal of an even earlier ruling. This tended to occur in unemployment cases.

144. *How Laws Are Made: The Administrative Agencies*, UNIV. OF GA. SCH. OF L. (Sept. 1, 2021, 12:57 PM), https://libguides.law.uga.edu/fdlp_webinars ("Administrative agencies act both quasi-judicially and quasi-legislatively . . . . They act like a court when conducting hearings and issuing rulings and decisions.").

145. Some COVID-19 cases involved employees who were terminated for not following employer safety guidelines—essentially a form of work refusal but not for safety reasons. Wells v. Enter. Leasing Co. of Norfolk/Richmond, LLC, 500 F. Supp. 3d 478, 481 (E.D. Va. 2020) (firing an employee

B. Research Findings

1. Risk, Occupation, and Year of First Ruling

Table 1
Work Refusal Cases (COVID-19 Cases in Parentheses)

Occupational Groups	
Management	2
Business & Financial	0
Computer & Math	1
Architecture & Engineering	1
Life, Physical & Social Science	0
Community & Social Service	1 (1)
Legal	1 (1)
Education, Training & Library	2 (1)
Arts, Design, Entertainment, Sports, Media	2
Healthcare Practice & Technical	4
Healthcare Support	4 (2)
Protective Service	2 (2)
Food Preparation & Serving	6 (2)
Building & Grounds Clean../Main.	2 (1)
Personal Care & Service	0
Sales & Related	1
Office & Administrative Support	0
Farming, Fishing & Forestry	3
Construction & Extraction	30
Install, Maintain & Repair	12
Production	18
Transportation/Material Moving	29 (2)
Year of First Ruling	
First Quartile (37 Years)	1944–1980
Second Quartile (9 Years)	1981–1989
Third Quartile (22 Years)	1990–2011
Fourth Quartile (10 Years)	2012–2021
Work Refusal Action	
Refuse Work Order (1 Employee)	58 (1)

for refusing to get tested for COVID-19 and to disclose medical information related to his family member who had tested positive for COVID-19). These were not included in my database.

Refuse Work Order (2 or More Employees)	20
Strike	6
Delay or Stop Work (1 Employee)	10 (6)
Delay or Stop Work (2 or More Employees)	5
Complain/Report/Object	12 (3)
Quit	10 (2)
Source of Risk	
Violence or Injuries by Persons or Animals	0
Transportation Incidents	19
Fire or Explosion	11
Fall, Slip, or Trip	11
Contact with Objects & Equipment	10
Overexertion & Bodily Reaction	26 (16)
Chemicals & Chemical Products	18
Containers, Furniture & Fixtures	3
Machinery	2
Parts & Materials	0
Persons, Plants, Animals, Minerals	2
Structures & Surfaces	2
Tools, Instruments & Equipment	6
Other	9
Claim of Legal Right	
Labor Management Relations Act	9
Occupational Safety and Health Act	14
Other Federal Safety Law	35 (1)
State Safety Law	5
Collective Bargaining Agreement	4 (1)
Unemployment Claim	24
Tort (Public Policy Wrongful Discharge)	20 (2)
FFCRA, EPSLA (COVID-19)	6 (6)
ADA	2 (2)
PDA	1
Employer Action	
Discharge	84 (6)
Discipline (Less Than Discharge)	11
Constructive Discharge	8
Allow Quit	13 (3)
Injunction	3 (1)
Other	2

No Accommodation; Reopen; Operate 3 (3)

Table 1 summarizes the sample of 121 cases. This includes 109 cases that began before COVID-19 and twelve cases that were filed after the onset of the pandemic in the United States. The left-hand column of statistics combines the pre-COVID-19 and COVID-19 cases. The statistics in parentheses break out the COVID-19 cases. This format allows an easy comparison of similarities and differences.

First-round rulings from 1944–2021 were observed in federal and state courts, as well as federal and state administrative law agencies. Cases arose under a variety of statutes and torts, including the LMRA (9 cases), the OSH Act (14 cases), more industry-specific federal safety laws (35 cases), state safety laws (5 cases), a collective bargaining agreement (4 cases), unemployment laws (24 cases), the public policy tort of wrongful discharge (20 cases), and the COVID-19 EPSLA for paid sick leave (6 cases).[146]

Employees engaged in work refusal actions alone (58 cases) or with two or more employees (20 cases); engaged in a strike (6 cases); delayed work alone (10 cases) or with two or more employees (5 cases); complained, objected, or reported a safety concern (12 cases); or quit (10 cases). Employer reactions to work refusal included discharge (84 cases); discipline less than discharge (11 cases); constructive discharge (8 cases); allowing the employee to quit (13 cases); and seeking an injunction for an actual or imminent work stoppage (3 cases).

Based on this overview of Table 1, I report key findings in the table's categories. I begin by reporting findings for occupations in work refusal cases.

Finding 1.A (Overall): Work refusal cases were concentrated in industrial sector occupations that involved mechanization of work: (1) construction and extraction (30 cases); (2) transportation and moving material (29 cases); (3) production (18 cases); and (4) installation, repair, and maintenance (12 cases).[147]

Finding 1.B (COVID-19): Although the sample had only twelve cases, work refusal cases arose in seven different occupational groups. The pattern

146. *See supra* Table 1.
147. *See supra* Table 1.

of cases shifted from industrial occupations to white-collar professional (community and social services; legal; and education, training, and library) and service jobs (healthcare support; protective services; food preparation and serving; and building cleaning).[148]

Finding 2.A (Overall): Work refusal cases were concentrated in 1981–1989 and became less frequent until 2021.[149]

Finding 2.B (COVID-19): The number of work refusal cases exploded in 2021 with ten cases.[150] In 1980, there were six work refusal cases, the next highest number by year.[151]

Finding 3.A (Overall): The source of risk in work refusal cases was significantly concentrated in chemical exposure and transportation work situations.[152] A smaller number of cases involved fire or explosion, slips and falls, contact with equipment or objects, and overexertion or bodily reactions.[153]

Finding 3.B (COVID-19): Since the onset of COVID-19, the risk of bodily reaction as a cause for a work refusal case has surged.[154] While this development appears to be unique since the first case in 1944, bodily reaction cases for COVID-19 seem similar to cases involving chemicals and chemical products as a risk factor: both risk categories involve exposure to occupational diseases.[155]

2. Winner of First-Round and Second-Round Rulings: 1981–1989 and 2020–2021

Tables 2.A and 2.B below present court rulings in 1981–1989 and eleven cases in 2020–2021.[156] The former group reflects the years comprising the most concentrated quartile of cases; the latter reflects the current period with its spike related to COVID-19 cases.[157] Both timeframes have higher

148. *See supra* Table 1.
149. *See supra* Table 1.
150. *See supra* Table 1.
151. *See supra* Table 1.
152. *See supra* Table 1.
153. *See supra* Table 1.
154. *See supra* Table 1.
155. *See supra* Table 1.
156. *See infra* Tables 2.A, 2.B.
157. *See infra* Tables 2.A, 2.B.

concentrations of cases. The red bars in each cluster represents employee wins, while black bars show employer wins. Each year has a cluster of up to four bars (e.g., 1982). The first two bars show *first-round* rulings per year, followed by two bars for *second-round* rulings that year.

Table 2.A
First & Second-Round Rulings by Year (1981–1989):
Employee and Employer Wins

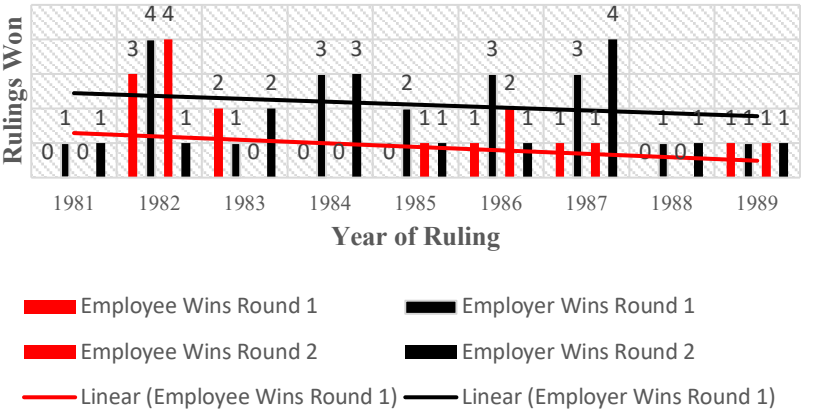
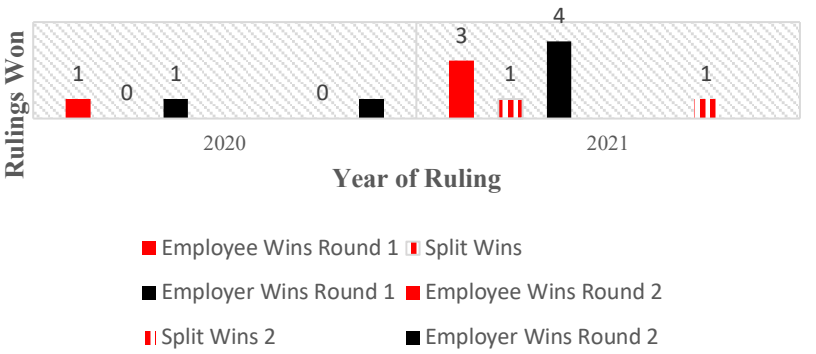


Table 2.B
First & Second-Round Rulings by Year (2020–2021):
Employee and Employer Wins



Finding 4 (1981–1989): Employees had only one year when they won more rulings than they lost. This occurred in second-round rulings in 1982, when they won four rulings and employers won one ruling.

Finding 5 (1981–1989): Employer wins increased from 1983–1987 and then declined.[158] Employees won only five first-round rulings in this lengthy period, compared to twelve first-round wins for employers. In second-round rulings, employees won four rulings compared to eleven wins for employers. The two trendlines in Table 2.A highlight the favorable pattern for employer wins relative to employee wins.[159]

Finding 6 (2020–2021): Court rulings split evenly for employees and employers in this period.[160] This trend, albeit with limited data, indicates more wins for employees compared to the 1980s.[161] However, given COVID-19's severity, the split in outcomes for employees and employers suggests that the

158. *See supra* Table 2.A.
159. *See supra* Table 2.A.
160. *See supra* Table 2.B.
161. *See supra* Tables 2.A, 2.B.

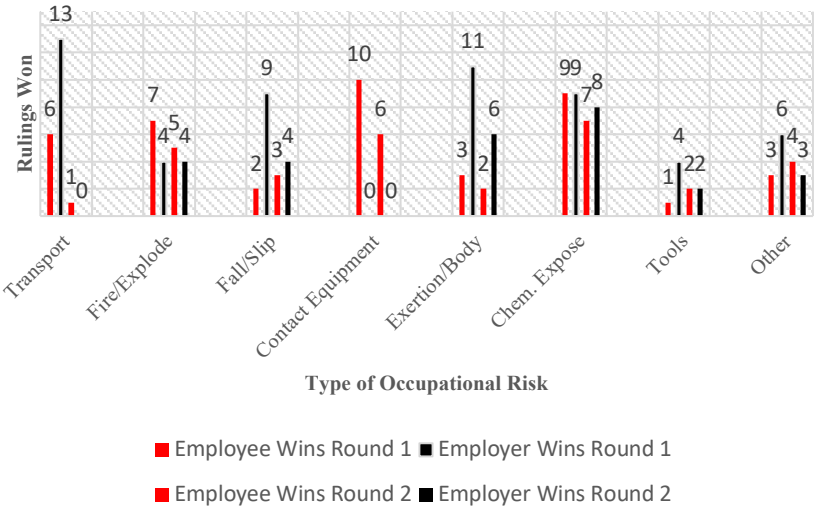
paid sick leave law offered only modest protections for employees.[162]

3. Winner of First-Round and Second-Round Rulings by Risk

Table 3.A (pre-COVID-19) and Table 3.B (during COVID-19) present court rulings, arranged in clusters, related to seven specific occupational risks and a category for others. In Table 3.A, the first bar in each cluster represents employee wins for first-round rulings (red bar).[163] The second bar shows wins for employers (black bar). The third and fourth bars, respectively, show employee and employer wins in the second round. Table 3.B reports only first-round rulings due to negligible second-round rulings for COVID-19 cases.[164]

162. *See supra* Table 2.B.
163. *See infra* Table 3.A.
164. *See infra* Table 3.B.

Table 3.A
First & Second-Round Rulings by Type of Risk: Employee and Employer Wins



Finding 7 (Pre-COVID-19 Cases): Employers won most rulings when work refusal was connected to an occupational risk from transportation (thirteen wins to six wins for employers in first-round rulings); overexertion or bodily reaction (eleven wins to three wins for employers in first-round rulings); and fall, slip, and trip risks (nine wins to two wins for employers in first-round rulings).[165]

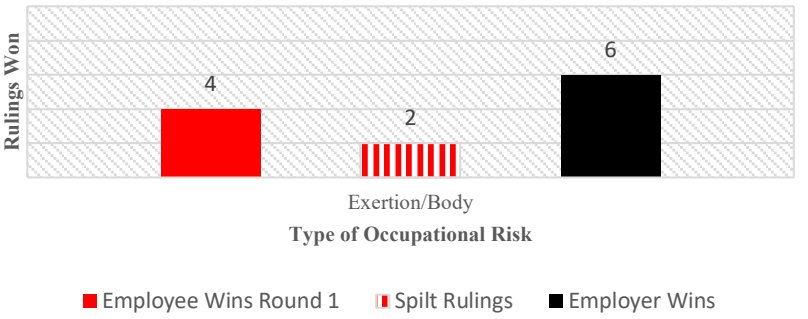
Finding 8 (Pre-COVID-19 Cases): Only one occupational risk led to an even split of first-round rulings for employee wins and employer wins: chemical exposure (nine cases apiece).[166]

Finding 9 (Pre-COVID-19 Cases): Employees won all first-round and second-round rulings in connection with a risk from contact with equipment

165. *See supra* Table 3.A.
166. *See supra* Table 3.A.

or an object (ten wins in Round 1 and six wins in Round 2).[167]

Table 3.B
First-Round Rulings by Type of Risk for COVID-19 Cases:
Employee and Employer Wins



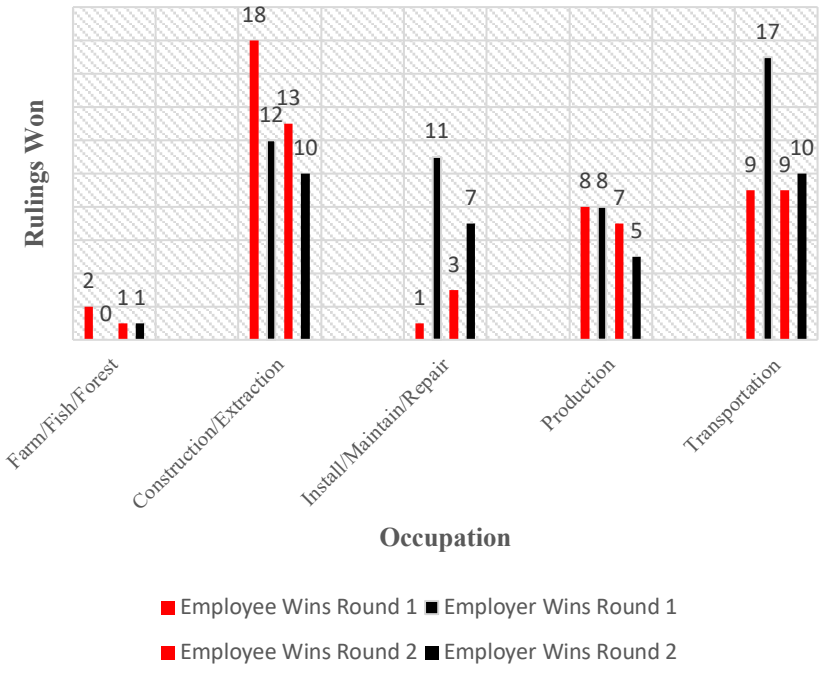
Finding 10 (COVID-19 Cases): In all twelve COVID-19 cases, the occupational risk was bodily reaction.[168] Employees won all or part of the rulings in six first-round rulings, while employers won rulings in the other six cases.[169] While the sample is small, it indicates a higher win rate for employees in bodily reaction cases involving work refusal compared to pre-COVID-19 cases.[170]

4. Winner of First-Round and Second-Round Rulings by Occupation

Tables 4.A and 4.B present court rulings, arranged in clusters, related to specific occupational groups for pre-COVID-19 and COVID-19 cases.[171]

167. *See supra* Table 3.A.
168. *See supra* Table 3.B.
169. *See supra* Table 3.B.
170. *See supra* Tables 3.A, 3.B.
171. *See infra* Tables 4.A, 4.B.

Table 4.A
First & Second-Round Rulings by Type of Occupation:
Employee and Employer Wins



Finding 11 (Pre-COVID-19 Cases): Employers won most rulings when work refusal occurred in a transportation job (seventeen wins to nine wins for employees in first-round rulings) or installation or maintenance (eleven wins to one win for employees in first-round rulings).[172]

Finding 12 (Pre-COVID-19 Cases): Only one occupational group, production, had an even split of first-round rulings for employee and employer

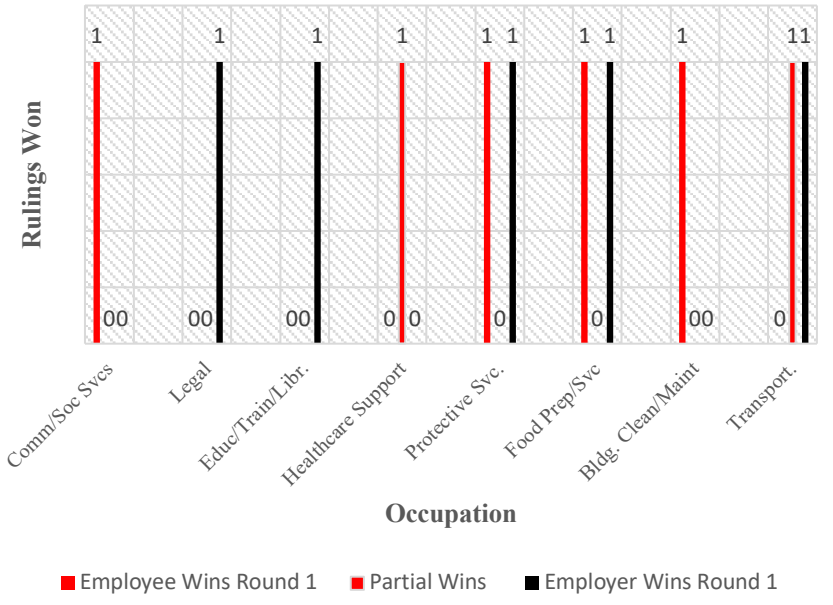
172. *See supra* Table 4.A.

wins (eight cases apiece).[173]

Finding 13 (Pre-COVID-19 Cases): Employees in construction or extraction won most rulings relating to work refusal (eighteen wins to twelve employer wins in first-round rulings and thirteen wins to ten employer wins in second-round rulings).[174]

Table 4.B

First-Round Rulings by Type of Occupation for COVID-19 Cases: Employee and Employer Wins



Finding 14 (COVID-19 Cases): COVID-19 work refusal cases show a

173. *See supra* Table 4.A.
174. *See supra* Table 4.A.

marked change in affected occupations.[175] None of the occupations in the pre-COVID-19 sample, except for transportation, are reflected in Table 4.B.[176] A broad range of new occupations are in evidence: community and social services; legal; education and related jobs; healthcare support; protective services; food preparation and service; and building cleaning and maintenance.[177] Notably, this marks a shift of work refusal cases to white-collar and service-sector jobs, away from the industrial jobs in the pre-COVID-19 period.

5. Winner of First-Round and Second-Round Rulings by Law

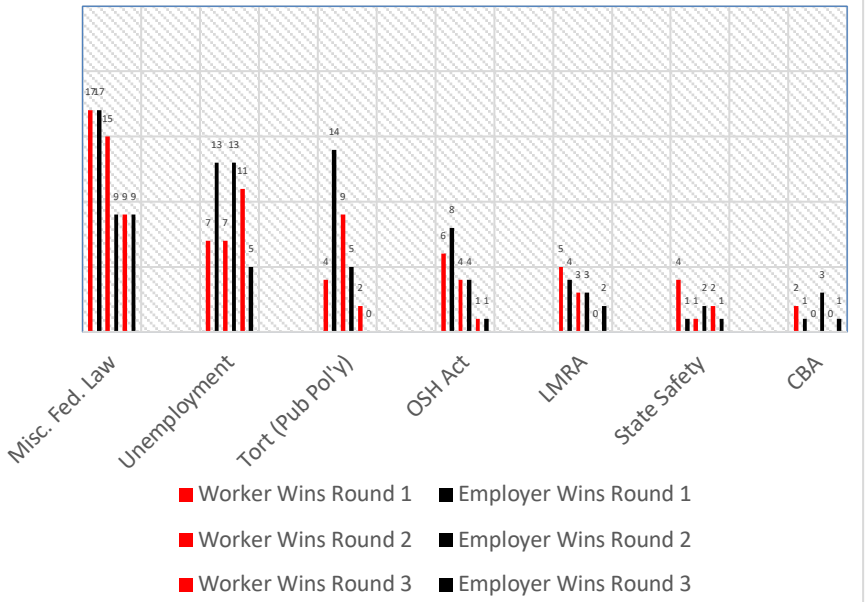
Tables 5.A and 5.B follow the same presentation with court rulings arranged by the type of law, except that third-round rulings are also reported to account for unemployment and industry-safety laws that begin with an entry-level administrative ruling and are appealed to a state board or commission and eventually a court. Thus, there are six bars for each area of law.

175. *Compare supra* Table 4.B (listing the types of occupations affected by COVID-19), *with supra* Table 4.A (listing the types of occupations previously affected by work refusal cases).

176. *See supra* Tables 4.A, 4.B.

177. See supra Table 4.B.

Table 5.A (Pre-COVID-19)
First, Second & Third-Round Rulings by Type of Law:
Employee and Employer Wins



Finding 15 (Pre-COVID-19 Cases): Employees had the most success in winning rulings involving industry-specific safety laws for mines, transportation, and railroads (shown as Misc. Fed. Law).[178] In first-round rulings, employees and employers won seventeen cases apiece. However, in second-round rulings, employees won fifteen rulings, compared to nine wins for employers.[179] In third-round rulings, employees and employers won nine rulings

178. *See supra* Table 5.A.
179. *See supra* Table 5.A.

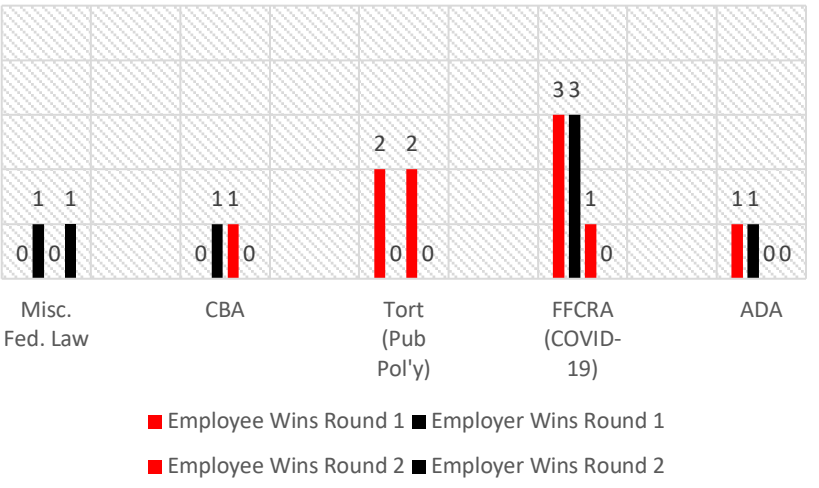
apiece.[180]

Finding 16 (Pre-COVID-19 Cases): Unemployment had a large swing in rulings from the first to third rounds.[181] Employers were mostly successful when they challenged unemployment claims from former employees who refused injurious work.[182] Employers won thirteen cases in the first round and also the second round, while employees won only seven cases in the first and second rounds.[183] However, these results changed in third-round rulings, where employees won eleven rulings, compared to five wins for employers.[184]

Finding 17 (Pre-COVID-19 Cases): The biggest swing in rulings occurred for claims arising out of the public policy tort of wrongful discharge.[185] Employers won most of these rulings in the first round by a wide margin, fourteen cases to four cases for employees.[186] This advantage was reversed in second-round rulings, where employees won nine rulings to five rulings for employers.[187] There were only two third-round rulings.[188] Employees won in both cases.[189]

180. *See supra* Table 5.A.
181. *See supra* Table 5.A.
182. *See infra* Part VI.
183. *See supra* Table 5.A.
184. *See supra* Table 5.A.
185. *See supra* Table 5.A.
186. *See supra* Table 5.A.
187. *See supra* Table 5.A.
188. *See supra* Table 5.A.
189. *See supra* Table 5.A.

Table 5.B (COVID-19)
First & Second-Round Rulings by Type of Law:
Employee and Employer Wins



Finding 18 (COVID-19 Cases): The FFCRA (EPSLA) was the most common work refusal law for COVID-19.[190] Employees won just over half of first and second-round rulings for EPSLA cases.[191] The public policy tort provided continuity of results in favor of employees, as these workers registered two wins in first and second-round cases, while employers had no wins.[192]

IV. INTERPRETING THE FINDINGS

The paucity of cases in this study is likely due to restrictive legal protections for employees who encounter perilous work conditions, rather than widely available safe working conditions. The LMRA only affords

190. *See* supra Table 5.B.
191. *See* supra Table 5.B.
192. *See* supra Table 5.B.

employees a vague protection, when their work conditions are "abnormally dangerous."[193] Because mines are inherently dangerous, it takes an unusual threat to life to successfully invoke this law.[194] Similarly, the OSH Act rule that provides employees a right to refuse work is mostly unusable, protecting them from retaliation only after they have exhausted other ways to communicate and address their safety concerns.[195] Laws for unemployment insurance have no specific language for work refusal; however, their disqualification standards include "willful . . . disregard of an employer's interests," a potential impediment to successful claims because refusing a work assignment is a willful act.[196] Employment-at-will offers workers a faster solution, permitting them to avoid an imminent danger by seeking a new job.[197] This practical alternative probably limits work refusal litigation.[198]

The results also show a pre-COVID-19 spike in work refusal cases from 1981 through 1989.[199] This period occurred shortly after the Supreme Court said in dictum in 1974 that work refusal could be legally protected when there is "ascertainable, objective evidence . . . that an abnormally dangerous condition for work exists[200] and an OSHA rule in 1980.[201] But the landmark rulings in *Gateway Coal* and *Whirlpool* did not unleash a growth in employee wins in work refusal cases, and the trends from the 1980s appear to have deterred employees from bringing more cases.[202]

Other findings demonstrate a few pockets of specific strengths for work refusal laws.[203] Table 3.A shows that employees won rulings when risks from

193. Labor Management Relations (Taft-Hartley) Act § 502, 29 U.S.C. § 143.

194. *See* 29 C.F.R. § 1977.12(b)(2) (2020).

195. *Id.* (delineating that employees, where possible, must have sought to try to eliminate the condition before refusal of work is legally protected).

196. Boynton Cab Co. v. Neubeck, 237 Wis. 249, 259 (1941); *see also* Jackson v. Bd. of Rev. of Dep't of Lab., 475 N.E.2d 879, 885 (Ill. 1985).

197. *See* Gardner v. Loomis Armored, Inc., 128 Wash. 2d 931, 935 (1996) (holding an employee may quit for no stated reason).

198. *See id.*

199. *See infra* Tables 1, 2.A, 2.B (providing data on amount of work refusal cases from 1981–1989).

200. Gateway Coal Co. v. United Mine Workers of Am., 414 U.S. 368, 387 (1974).

201. Whirlpool Corp. v. Marshall, 445 U.S. 1, 9–10 (1980).

202. *See supra* Table 2.A.

203. *See supra* Table 3.A (showing employees have a better chance of winning work refusal cases in fire, explosion, or contact equipment categories).

contact or objects presented objective dangers.[204] Cases included workers who refused to grease a moving mining belt,[205] refused to put their hands near exposed blades,[206] refused to use a polishing machine without guards,[207] refused to change grates "on the fly,"[208] refused to operate an unsafe saw guide,[209] refused to stay in a mine after a five-ton rock fell from a ceiling,[210] refused to travel in a mine section with accumulating water,[211] and refused to work near an open electrified cable.[212]

Table 3.A also shows that courts ruled for employees who refused to work when there was an objective risk of fire or explosion.[213] Cases included an oil rig worker who refused to cap a leaking well,[214] a miner who refused to ignite a drier in a taconite mine,[215] a worker in a coal liquification plant who refused to refuel gas in tanks that had not yet cooled and were located beneath sparks from welders,[216] a worker who refused to load scrap metal in a kettle where his vehicle had no safety shield from splashing molten lead,[217] a miner who refused to continue to work as his crew advanced toward a mapped abandoned mine, where penetration of a wall could lead to explosion, fire, or air with no oxygen,[218] and workers who refused to be hoisted 180 feet above the ground to a narrow platform without guards or pad eyes to hook their safety

204. *See supra* Table 3.A (showing employees won rulings when risks from contact or objects presented objective dangers).

205. Leeco, Inc. v. Hays, 965 F.2d 1081, 1083 (D.C. Cir. 1992).

206. Martin v. H.M.S. Direct Mail Serv., Inc., 936 F.2d 108, 108 (2d Cir. 1991).

207. *See* Walt Indus. Inc., v. Dep't of Lab., No. 180124, 1997 WL 33352761 (Mich. Ct. App. Apr. 11, 1997).

208. Hanna Mining Co. v. United Steelworkers of Am., 464 F.2d 565, 567 (8th Cir. 1972).

209. *See* Webster v. Potlatch Forests, Inc., 187 P.2d 527, 528 (Idaho 1947).

210. *See* Munsey v. Morton, 507 F.2d 1202, 1205 (D.C. Cir. 1974).

211. *See* S. Ohio Coal Co. v. Fed. Mine Safety & Health Rev. Comm'n, 716 F.2d 1105, 1106 (6th Cir. 1983).

212. Maggard, 8 FMSHRC 806, 806 (1986).

213. *See supra* Table 3.A (showing employees won more work refusal cases when there was an objective risk of fire or explosion).

214. *See* Miss. Emp. Sec. Comm'n v. Phillips, 562 So. 2d 115, 117 (Miss. 1990).

215. Ottawa Silica Co. v. Sec'y of Lab., 780 F.2d 1022, 1022 (6th Cir. 1985).

216. Paige v. Henry J. Kaiser Co., 826 F.2d 857, 859 (9th Cir. 1987).

217. Marshall v. N.L. Indus., 618 F.2d 1220, 1222 (7th Cir. 1980).

218. Simpson v. Fed. Mine Safety & Health Rev. Comm'n, 842 F.2d 453, 455 (D.C. Cir. 1988).

harnesses.[219]

However, Table 3.A shows a different pattern, too: employers won most of the rulings involving invisible or latent risks to workers.[220] These cases included work refusal due to an employee's concern about overexertion or a bodily reaction—for example, a nurse who feared needle pricks from HIV-positive patients[221] and another nurse who feared an adverse reaction to a flu shot.[222] Employers won cases where a truck driver,[223] a railroad worker,[224] and fish processing workers out at sea[225] refused to work on safety grounds related to their fatigue.[226] Similarly, an employee was denied unemployment benefits when he refused work due to his experience with long-term rashes from exposure to conditions in a mine.[227] An employee who refused to continue working in 110 degree heat while suffering from dehydration lost his unemployment case,[228] while a welder who complained about air quality and breathing conditions in a confined space lost his wrongful discharge case.[229]

Unsurprisingly, Table 3.B shows that all of the COVID-19 cases involved a risk of bodily reaction to the virus.[230] The more salient point is that the cases

219. Brock *ex rel*. Parker v. Metric Constructors, Inc., 766 F.2d 469, 470 (11th Cir. 1985).

220. *See supra* Table 3.A.

221. Stepp v. Rev. Bd. of Ind. Emp. Sec. Div., 521 N.E.2d 350, 352 (Ind. Ct. App. 1988).

222. Rhodenbaugh v. Kan. Emp. Sec. Bd. of Rev., 372 P.3d 1252, 1255 (Kan. Ct. App. 2016).

223. Peery v. Rutledge, 355 S.E.2d 41, 43 (W. Va. 1987).

224. Laveing v. Norfolk S. Ry. Co., No. 19-CV-01095-CRE, 2020 WL 5768730, at *1–2 (W.D. Pa. Aug. 21, 2020).

225. Cornelio v. Premier Pac. Seafoods, Inc., No. 54445-4-I, 2005 WL 1331205 (Wash. Ct. App. May 23, 2005). The crewmembers were expected to work sixteen-hour days, seven days a week, and many of them had previously worked as processors for Premier Pacific. *Id.* at *1. They understood the harsh conditions they faced when they agreed to do the work. *Id.* Their wrongful discharge claim required that they prove that the extra half hour in their daily work schedule created unreasonably dangerous working conditions such that public policy required that they be allowed to refuse to work without being discharged. *Id.* at *3.

226. *See Peery*, 355 S.E.2d 41; *Laveing*, 2020 WL 5768730; *Cornelio*, 2005 WL 1331205.

227. Wolfgram v. Emp. Sec. Agency, 291 P.2d 279, 300–01 (Wyo. 1955).

228. Hernandez v. Pitt Ohio Express, LLC, No. 11 CV 1507, 2012 WL 3496860 (N.D. Ohio Aug. 14, 2012).

229. Porter v. Reardon Mach. Co., 962 S.W.2d 932, 934–35 (Mo. Ct. App.1988). *But see* McCrocklin v. Emp. Dev. Dep't, 205 Cal. Rptr. 156, 157 (Ct. App. 1984) (awarding unemployment benefits to a worker who quit due to exposure to second-hand smoke, where the employee suffered tangible physical side effects and worried about his health and safety).

230. *See supra* Table 3.B.

demonstrate the recklessness of some workplaces during the pandemic.[231] Employees lost their jobs for refusing to break COVID-19 protocols ordered by healthcare professionals.[232] Other employees, some with serious COVID-19 risk factors, faced adverse treatment after they avoided in-person work because their employer failed to take basic precautions to mitigate infection.[233] Yet another employee was terminated for missing work while she was ill and sought medical help to determine if she had COVID-19.[234]

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231. *See supra* Table 3.B.

232. In *Payne v. Woods Services, Inc.*, a residential counselor was fired for refusing to return to work when he was instructed to remain in quarantine after testing positive for COVID-19. No. 20-4651, 2021 WL 603725, at *3 (E.D. Pa. Feb. 16, 2021). In *Beltran v. 2 Deer Park Drive Operations LLC*, a building maintenance technician was terminated after he complied with a quarantine memo relating to his mother's positive COVID-19 test and failed to report to work during this period. No. 20-8454, 2021 WL 794745, at *3–*4 (D.N.J. Feb. 28, 2021). In *Colombe v. SGN, Inc.*, an employee whose husband was instructed to quarantine, along with all other family members, was fired for not returning to work during this period and for not satisfying her employer's concern that the quarantine order did not have her name on it. No. 20-CV-374, 2021 WL 1198304, at *10 (E.D. Ky. Mar. 29, 2021).

233. Smith v. Corecivic of Tenn. LLC, No. 20-cv-0808-L-DEB, 2021 WL 927357, at *2–5 (S.D. Cal. Mar. 10, 2021) (involving a correctional officer who was at a higher risk for COVID-19 complications due to asthma and pneumonia and in March 2020 alleged that she was forced to quit because her employer failed to provide a safe work environment to mitigate COVID-19 at its facilities by having large group meetings and failing to provide masks); Peeples v. Clinical Support Options, Inc., 487 F. Supp. 3d 56, 61 (D. Mass. 2020) (detailing an office manager who suffered from moderate asthma, and who was ordered to return to work in a setting where personal protective equipment (PPE), masks, hand sanitizer, and wipes were not always available, who then sued to enjoin her employer from imminently firing her because she requested the reasonable accommodation of continued telecommuting); Brooks v. Corecivic of Tenn. LLC, No. 20cv0994 DMS, 2020 WL 5294614, at *5 (S.D. Cal. Sept. 4, 2020) (involving a detention officer, with risk factors for her race and obesity, who felt compelled to resign after a supervisor ordered her to work without a mask, even after two hundred thirty-four detainees and thirty staff members tested positive for the virus); Toro v. Acme Barricades, L.C., No. 20-cv-1867-Orl-22, 2021 WL 616318, at *3 (M.D. Fla. Jan. 28, 2021) (consisting of an employee with COVID-19 risk factors who was instructed by his doctor to work from home, then was subsequently terminated for not reporting to work in his office); Chew v. Legislature of Ohio, 512 F. Supp. 3d 1124, 1126–27 (D. Idaho 2021) (concerning two lawmakers with serious medical conditions—one with type II diabetes and hypertension and another with paraplegia that led to diminished lung capacity—who sought telecommuting or self-contained work spaces as accommodations under the Americans with Disabilities Act but were denied); Thornberry v. Powell Cnty. Det. Ctr., No. 20-271-DCR, 2020 WL 5647483, at *2 (E.D. Ky. Sept. 22, 2020) (involving a substance abuse counselor at a detention center during the early days of the COVID-19 pandemic, who refused to come to work unless her employer provided new precautions to mitigate the spread of the virus).

234. Valdivia v. Paducah Ctr. for Health & Rehab., LLC, 507 F. Supp. 3d 805, 808 (W.D. Ky. 2020) (detailing a nurse who was fired after she was sent home with a fever, determined that she had a

Turning to the relationships between types of jobs and win rates in work refusal cases, the finding in Table 4—that mining and extraction employees won a majority of cases—shows how work refusal laws that are tailored to an industry's extreme conditions can benefit workers.[235] Discharged employees won rulings after they refused an assignment that created risk from a ten-ton trailing motor,[236] refused to start an unsafe longwall mining machine,[237] refused to work on a mine section with a cracked roof that later fell,[238] refused to load a coal truck above twenty-four tons,[239] refused to work in an area of trapped fumes,[240] refused to light a gas drier with a handheld flame,[241] and refused to grease machinery that was running.[242]

Table 5.A, depicting the law in employee and employer wins, reinforces my study's primary finding that work refusal safety laws have only limited value for employees.[243] Employee success in appellate rulings for the public policy tort of wrongful discharge and unemployment offer an intriguing perspective on the low value of worker safety laws.[244] This tort, and this

stomach virus, sought confirmation that she was not infected with COVID-19, and then tried unsuccessfully to have her absence excused with a doctor's note).

235. *See supra* Table 4.A.

236. Consolidation Coal Co. v. Fed. Mine Safety & Health Rev. Comm'n, 795 F.2d 364, 365–66 (4th Cir. 1986) (involving a mine worker who was given a suspension for refusing a work assignment that he believed endangered the safety of a coworker by exposing that person to a risk from a ten-ton trailing motor).

237. Miller v. Fed. Mine Safety & Health Rev. Comm'n, 687 F.2d 194, 196 (7th Cir. 1982).

238. Gilbert v. Fed. Mine Safety & Health Rev. Comm'n, 866 F.2d 1433, 1435–36 (D.C. Cir. 1989).

239. Wellmore Coal Corp. v. Fed. Mine Safety & Health Rev. Comm'n, No. 97-1280, 1997 WL 794132, at *1 (4th Cir. Dec. 30, 1997) (delineating a coal truck driver who was fired for refusing to load his truck above the company's minimum load requirement of twenty-four tons, claiming that this weight was an unacceptable safety hazard).

240. Liggett Indus. v. Federal Mine Safety & Health Rev. Comm'n, 923 F.2d 150, 152 (10th Cir. 1991) (involving welders who walked off the job after a miner named Begay voiced concerns about his health being endangered by trapped fumes that were not addressed by his employer).

241. Ottawa Silicia Co. v. Sec'y of Lab., Mine Safety & Health Admin., No. 84-3859, 1985 WL 13948 (6th Cir. Nov. 11, 1985) (ruling in favor of a miner, ostensibly fired for using profanity, who was fired after he refused to light a gas drier with a handheld flame, a practice the miner considered to be unsafe).

242. Hays v. Fed. Mine Safety & Health Rev. Comm'n, 965 F.2d 1081, 1083 (D.C. Cir. 1992) (ruling in favor of an employee who routinely was required to risk his life and limb by greasing machinery while it was in operation, even after he addressed his safety concerns to management).

243. *See supra* Table 5.A.

244. *See supra* Table 5.A.

postemployment benefit law, act as safety nets for safety-conscious workers.[245] But these laws were not specifically designed for safety or work refusal situations; they serve as gap fillers when other safety laws fail employees by penalizing them for refusing unusually hazardous assignments.[246]

Courts have adopted the public policy tort (often called wrongful discharge or unjust dismissal) to temper the harsh consequences of employment-at-will.[247] Discharged employees benefitted from appellate rulings after they were fired for refusing to work in a war-torn region,[248] seeking a smoke-free environment,[249] requesting a transfer after an employer installed a machine with live radioactive cobalt,[250] refusing to work near cyanide with an open surgical wound,[251] and declining to work on Saturday and Sunday—due to angina stemming from heart surgery—after working thirty-five hours the previous two days and sixty-one hours for the week.[252] The public policy tort also benefitted a ship captain who was to set sail with his crew twice in a short time with a barge load of a toxic chemical but refused to leave port due to two separate hurricane advisories for his routes in the Gulf of Mexico.[253]

Unemployment insurance claimants won appellate rulings because they

245. *See supra* Tables 5.A, 5.B.

246. *See supra* Tables 5.A, 5.B.

247. Gardner v. Loomis Armored Inc., 913 P.2d 377, 379 (Wash. 1996) (en banc) (discussing how courts have adopted an exception to the common law rule that at-will employees could be fired for any reason: "employees may not be discharged for reasons that contravene public policy").

248. Parsons v. United Tech. Corp., Sikorsky Aircraft Div., 700 A.2d 655, 658 (Conn. 1997) (ruling in favor of an employee who was fired immediately after he informed his employer he would not travel to Bahrain because of concerns for his health, safety, and welfare, supported by a State Department travel advisory).

249. Hentzel v. Singer Co., 188 Cal. Rptr. 159, 161 (Ct. App. 1982) (ruling in favor of an employee who was terminated for his "attempt to obtain a reasonably smoke-free environment").

250. Wheeler v. Caterpillar Tractor Co., 485 N.E.2d 372 (Ill. 1985).

251. W. States Minerals Corp. v. Jones Corp., No. 19697, 1991 Nev. LEXIS 17, at *34 (Nev. Mar. 7, 1991), *aff'd sub nom*. D'Angelo v. Gardner, 819 P.2d 206 (Nev. 1991) ("[I]t is violative of public policy for an employer to dismiss an employee for refusing to work under conditions dangerous to the employee.").

252. Wilcox v. Niagara of Wis. Paper Corp., 965 F.2d 355, 357 (7th Cir. 1992).

253. Borden v. Amoco Coastwise Trading Co., 985 F. Supp. 692, 698 (S.D. Tex. 1997) ("The Court today recognizes a strong public policy in protecting the safety of not only seamen, but the public as well, and . . . [t]hese considerations, coupled with the public policy implications surrounding [46 U.S.C.] § 10908, are sufficient to [overcome] the at-will presumption. Thus, the public policy exception is clearly applicable in this case.").

had legal justifications to quit jobs that presented some degree of peril.[254] These outcomes overcame legal barriers for claimants who quit work.[255] These unemployment claims are generally denied because the law requires evidence that the employer caused the employment relationship to end.[256] Even when work conditions create some degree of pressure to consider quitting, unemployment claims are sometimes denied.[257] However, when employees in this study were terminated in response to avoiding a threat to their safety, their claims were ruled to be compensable.[258]

Moore v. Unemployment Insurance Appeals Board[259] illustrates this framework.[260] A union electrician was referred to a job at a nuclear power plant but refused the assignment due to safety concerns.[261] Based on news reports and coworker accounts, he was made aware of alleged safety violations relating to radiation exposure.[262] He asked his supervisor for the precise location of his assigned job and told his supervisor he feared working near

254. *See supra* notes 248–52 and accompanying text.

255. *See supra* notes 248–52 and accompanying text.

256. Jones v. Ill. Dep't of Emp. Sec., 657 N.E.2d 1141 (Ill. App. Ct. 1995) ("The Act is intended to benefit only those persons who become unemployed through no fault of their own . . . . [Thus,] 'an individual shall be ineligible for benefits because he left work voluntarily without good cause attributable to the employing unit.'").

257. *See, e.g.*, Davis v. Lab. & Indus. Rels. Comm'n, 554 S.W.2d 541, 543 (Mo. Ct. App. 1977) (concluding that "pressure of the circumstances" in a quit case could be found as a discharge for purposes of unemployment compensation, though, in this case, a nurse who stopped working forty days before giving birth and remained out of work for an additional month before applying for unemployment benefits had not been discharged); *cf.* Burke v. Bd. of Rev., 477 N.E.2d 1351, 1356 (Ill. Ct. App. 1985) (stating that "'good cause' for voluntarily leaving one's employment results from circumstances which produce pressure to terminate employment that is both real and substantial and which would compel a reasonable person under the circumstances to act in the same manner").

258. *See supra* Section III.B (noting a misconduct standard in unemployment compensation laws does not apply when a claimant refuses to perform a job assignment because he or she believes in good faith that performing the assignment would jeopardize his or her health); McLean v. Unemployment Comp. Bd. of Rev., 383 A.2d 533, 535 (Pa. 1978); Ferguson v. Dep't of Emp. Servs., 247 N.W.2d 895, 897 (Minn. 1976); Kuhn v. Dep't of Emp. Sec., 357 A.2d 534, 535 (Pa. 1976); Webster v. Potlatch Forests, Inc., 187 P.2d 527, 528 (Idaho 1947); Smallwood v. Fla. Dep't of Com., 350 So. 2d 121, 121 (Fla. Dist. Ct. App. 1977); s*ee also* City of Dallas v. Tex. Emp. Comm'n, 626 S.W.2d 549, 551 (Tex. App. 1981).

259. Moore v. Unemployment Ins. Appeals Bd., 215 Cal. Rptr. 316, 320 (Ct. App. 1985).

260. *See id.*

261. *Id.*

262. *Id.*

"red waste."[263] When he was terminated for refusing work,[264] he replied: "Well, I want to make something very clear here. I'm not refusing to do the work. I can't go in the radioactive waste area because I'm afraid of the radiation."[265] After this electrician filed for unemployment, a court ruled that he presented evidence of a "reasonable, good-faith and honest apprehension of harm to [his] health and safety within the San Onofre work environment, setting forth a condition of employment falling within the ambit of good cause."[266]

V. CONCLUSIONS

Work refusal safety laws serve employees poorly.[267] That is the primary import of my empirical study.[268] Certainly, these laws achieve policy objectives when there is a good match between an industry-specific law and a physical hazard that a court or agency can readily comprehend—a falling roof in a mine,[269] molten lead that splashes into a workspace,[270] an underwater leak from an oil rig.[271] But even my data sources demonstrate structural problems with our work safety laws.[272] The Bureau of Labor Statistics data collection for occupational fatalities counts physical events, such as crashes, collisions, shootings, fires, falls, electrical shocks, contact with objects, and the like.[273] At the end of this lengthy survey with many dozens of physical causes, there are two entries for "overexertion and bodily reaction"—and the data reporting

263. *Id*.
264. *Id.* at 318.
265. *Id.*
266. *Id.* at 244.
267. *See supra* Section III.B (reporting data findings in Table 5); *see also supra* Part IV (interpreting Table 5.A findings that work refusal safety laws are limited for employees).
268. *See supra* Part IV (highlighting the difficulty employees have when asserting work refusal claims).
269. *See* Gilbert v. Fed. Mine Safety & Health Rev. Comm'n, 866 F.2d 1433 (D.C. Cir. 1989).
270. Marshall v. N.L. Indus., 618 F.2d 1220, 1222 (7th Cir. 1980).
271. *See* Miss. Emp. Sec. Comm'n v. Phillips, 562 So. 2d 115, 117 (Miss. 1990).
272. *See supra* Part IV.
273. *See Census of Fatal Occupational Injuries (CFOI): Definitions*, U.S. BUREAU OF LAB. STAT., https://www.bls.gov/iif/oshcfdef.htm (Dec. 17, 2020).

indicates very few occurrences.[274]

As my research shows, conflating overexertion and a bodily reaction to a disease obfuscates two entirely different physiological responses to workplace exposure to potentially lethal conditions.[275] It is not even clear that BLS will be able to capture the work exposures to COVID-19 that are highlighted in this Article—specifically, the cases reported by front-line workers in healthcare[276] and workers in meatpacking plants.[277] In sum, the federal government's probable undercounting of fatal bodily reactions to exposure events such as disease, radiation, and chemicals correlates to safety laws that are stuck in outdated notions of job hazards.[278]

My study also shows that COVID-19 has shifted work refusal from blue-collar jobs to white-collar and service-sector jobs.[279] At some point, however, the pandemic will recede, and the pattern of work refusal may revert to trends from 1944 to 2020.[280] My study reveals the pronounced use of work refusal laws in construction and extraction, production, and transportation.[281] As the COVID-19 cases show, however, a virus can present risks that the traditional occupational fatality survey will likely miss.[282]

Workplace sexual assaults[283] are a case in point. My extensive research

274. *See Table A-9. Fatal Occupational Injuries by Event or Exposure for All Fatal Injuries and Major Private Industry Sector, All United States, 2019*, U.S. BUREAU OF LAB. STAT.: INJURIES, ILLNESSES & FATALITIES, https://www.bls.gov/iif/oshwc/cfoi/cftb0334.htm (last visited Oct. 9, 2021) (reporting eight fatalities in 2019 due to overexertion).

275. *See supra* Part III (noting the different types of risk—Finding 3.A identifies overexertion in cases involving risks such as slips and falls, whereas Finding 3.B identifies bodily reaction to chemicals).

276. *See* Colombe v. SGN, Inc., No. 20-CV-374, 2021 WL 1198304 (E.D. Ky. Mar. 29, 2021).

277. Rural Cmty. Workers All. v. Smithfield Foods, Inc., 459 F. Supp.3d 1228 (W.D. Mo. 2020) (seeking injunctive relief for a meatpacking plant that became a major COVID-19 hot spot due to failure to maintain safe practices such as social distancing, handwashing, masking, and use of sick-leave policy).

278. *See Census of Fatal Occupational Injuries (CFOI): Definitions, supra* note 273.

279. *See supra* Finding 1.B.

280. *See supra* notes 147–48.

281. *See supra* Section III.B.4 (charting results of cases pre-COVID-19 in Table 4.A—where risk was prevalent in construction and extraction, production, and transportation).

282. *See* Brooks v. Corecivic of Tenn. LLC, No. 20cv0994 DMS, 2020 WL 5294614, at *5 (S.D. Cal. Sept. 4, 2020).

283. Extreme forms of sexual harassment appear to present women with scenarios that are analogous to the DOL rule that requires apprehension of injury; however, my research found no evidence

failed to uncover a single case where an employee refused to return to work, or quit, because she experienced or feared sexual assault on the job. This cannot reflect the reality of today's workplace for some women.[284] The juxtaposition of work refusal cases in mining,[285] factory,[286] and truck driving[287] cases—male-dominated jobs that present obvious physical hazards[288]—with the total absence of work refusal cases involving sexual assaults demonstrates how laws and surveys miss some types of work refusal.[289]

These holes in collecting data on workplace injuries are compounded by

that the rule has been invoked in these situations. *See EEOC Sues Virginia IHOP Owner for Sexual Harassment and Constructive Discharge*, EEOC (Mar. 16, 2021), https://www.eeoc.gov/newsroom/eeoc-sues-virginia-ihop-owner-sexual-harassment-and-constructive-discharge (settling a lawsuit after a restaurant manager was accused of subjecting female employees to unwanted advances and touching, "including asking teen workers to show their breasts to him and exposing himself to a teen worker"); *see also* Small v. N.Y. State Dep't of Corr. & Cmty. Supervision, No. 12-CV-1236, 2019 WL 1593923, at *5 (W.D.N.Y. Apr. 15, 2019) (involving a male corrections officer who relentlessly pursued female corrections teacher by preying on her religious beliefs); Tri-County Youth Programs, Inc. v. Acting Deputy Dir. of the Div. of Emp. & Training, 765 N.E.2d 810, 813 (Mass. App. Ct. 2002) (pertaining to female manager's denied request for transfer after a youth offender in a detention center sexually assaulted her); *In re* Question Submitted by the U.S. Ct. of Appeals for the Tenth Cir., 759 P.2d 17 (Colo. 1988) (en banc) (concerning a janitor who raped an employee as she was walking to company cafeteria); Maksimovic v. Tsogalis, 687 N.E.2d 21, 22 (Ill. 1997) (involving a restaurant owner who threatened a waitress, stating that he would "'give her a stiff one up the a[**],' ordered her to perform oral sex on him[,] . . . placed his hand under her skirt and grabbed her leg, grabbed her buttocks and touched her while attempting to kiss her"); Ford v. Revlon, Inc., 734 P.2d 580, 582 (Ariz. 1987) (regarding a male supervisor, who, after telling a female employee, "I am going to f[***] you if it takes me ten years," grabbed her in a chokehold while running his open hand over her breasts, stomach, and between her legs).

284. *See supra* note 283 and accompanying text.

285. *See, e.g.*, Maggard v. Chaney Creek Coal Corp., No. KENT 86-51-D, 1986 WL 221513, at *3 (Ky. May 8, 1986); Bjes v. Consolidated Coal Co., No. PENN 82-26-D, 1982 WL 176180, at *1 (Pa. Nov. 23, 1982); Sec. of Lab. *ex rel.* Bryant v. Clinchfield Coal Co., No. VA 80-162-D, 1982 WL 176103, at *4 (Va. July 29, 1982); and Sec'y of Lab., MSHA *ex rel.* Robinette v. United Castle Coal Co., No. VA 79-141-D, 1981 WL 141638, at *4, *5 (Va. Ct. App. Apr. 3, 1981).

286. *See, e.g.*, Comm'r of Lab. v. Talbert Mfg. Co., 593 N.E.2d 1229 (Ind. 1992); Perez v. E. Awning Sys., Inc., No. 15-cv-01692, 2018 WL 4926447 (D. Conn. filed Oct. 10, 2018); Lee v. Ardagh Glass, Inc., No. 14-cv-0759, 2015 WL 251858 (E.D. Cal. Jan. 20, 2015).

287. *See, e.g.*, Smallwood v. Fla. Dep't of Com., 350 So.2d 121 (Fla. Dist. Ct. App. 1977); McLean v. Unemployment Comp. Bd. of Rev., 383 A.2d 533 (Pa. 1978); Yellow Freight Sys., Inc. v. Reich, 27 F.3d 1133 (6th Cir. 1994).

288. *Labor Force Statistics from the Current Population Survey*, U.S. BUREAU OF LAB. STAT., https://www.bls.gov/cps/cpsaat18b.htm (Jan. 22, 2021) (showing that the percentages of women in mining [10.1%], manufacturing [29.5%], and truck transportation [12.4%] were low).

289. *See supra* Part III.

the outmoded way that the Bureau of Labor Statistics defines a job.[290] BLS has a classification for passenger vehicle drivers that includes taxi drivers and chauffeurs, as it collects hourly wage information for them.[291] Rideshare drivers do not make an hourly wage, however.[292] This signifies that the agency only collects data for passenger vehicle drivers who are in a formal employment relationship, not gig drivers for Uber, Lyft, and other ridesharing platforms.[293] To the extent that federal labor statistics are premised on a formal employment relationship, they omit the growing class of workers who are paid piece-rates.[294] To put this problem more concretely, the 2021 BLS occupational fatality report might fail to include the Instacart shopper who was shot and killed at a Boulder, Colorado, grocery store but count the King Soopers employees who lost their lives.[295]

Several policy suggestions emerge from this research.[296] A seemingly minor idea, perhaps fraught with political controversy, is to amend the Americans with Disabilities Act[297] to enact a right of employees to wear a mask at work, unless an employer can prove that it is an undue hardship.[298] This would appear to address employee concerns about poor employer mitigation for COVID-19 but would also have a longer impact for workers who are exposed to second-hand smoke, the flu, and other aerosol hazards.[299] As such, this law

290. *See Scope of the Census of Fatal Occupational Injuries (CFOI)*, U.S. BUREAU OF LAB. STAT., https://www.bls.gov/iif/cfoiscope.htm# (Oct. 8, 2020) (limiting the CFOI to injuries either on the employer's premises or when related to status as an employee).

291. *See Table A-9. Fatal Occupational Injuries by Event or Exposure for All Fatal Injuries and Major Private Industry Sector, All United States, 2019*, *supra* note 274.

292. *See, e.g.*, *How Your Pay Is Calculated*, LYFT (July 29, 2019), https://www.lyft.com/hub/posts/pay-breakdown (detailing the method of paying Lyft drivers).

293. *See, e.g.*, CAL. BUS. & PROF. CODE § 7451 (West 2020) (stating that in California, ride-share participants are not formal employees of companies, but independent contractors).

294. *Id.*

295. *See also* Patrick McGeehan, *They Risked Their Lives During Covid. They Still Don't Earn Minimum Wage*, N.Y. TIMES (July 15, 2021), https://www.nytimes.com/2021/07/15/nyregion/nyc-gig-workers-pay.html (reporting that gig workers were more likely than regular employees to suffer health problems during the COVID-19 pandemic).

296. *See supra* Part I.

297. Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101–12213.

298. *Id.* at § 12111(10)(a)–(b).

299. *See* Rami Sommerstein et al., *Risk of SARS-CoV-2 Transmission by Aerosols, the Rational Use of Masks, and Protection of Healthcare Workers from COVID-19*, 9 ANTIMICROBIAL RESISTANCE & INFECTION CONTROL 1 (2020).

would function as a proxy for work refusal safety laws.[300] It would also address the increasing trend of work refusal cases in white-collar and service-sector jobs.[301]

My research also underscores the possible utility of a federal paid sick leave law, perhaps patterned after California's law.[302] If COVID-19 mutations persist and evade vaccines, Congress might consider reviving the Emergency Paid Sick Leave Pay Act.[303] Given the large number of immunocompromised individuals,[304] a paid sick leave law would obviate some of the need for these vulnerable people to refuse work in order to avoid consequential exposures to seasonal flu, measles, and other upsurges in infectious diseases.[305]

A third suggestion is to amend the OSH Act work refusal rule to address some of the occupational disease exposures that this study reports.[306] The current rule protected the two employees in *Whirlpool* who refused to work on a suspended screen because an employee had fallen through the screen and died a short time before.[307] But the rule in its present form would not appear to address the concern of the electrician in the nuclear power plant who refused to work near "red waste,"[308] nor the x-ray technician who worked near live cobalt,[309] nor the sawmill employee who refused to work in red cedar dust,[310] nor a worker who had an open wound exposed to cyanide.[311] The

300. *Id.*

301. *See supra* Finding 1.B.

302. CAL. LAB. CODE §§ 245–249 (West 2020). The law provides that an "employee has no less than 24 hours of accrued sick leave or paid time off by the 120th calendar day of employment or each calendar year, or in each 12-month period." *Id.* at § 246(3). The law also requires supplemental paid sick leave for COVID-19 related matters. *Id.* at § 248.1(B)(4)(b).

303. *See supra* notes 101–03 and accompanying text.

304. *See* Rafael Harpaz, Rebecca M. Dahl & Kathleen L. Dooling, *The Prevalence of Immunocompromised Adults: United States, 2013*, 3 OPEN FORUM INFECTIOUS DISEASES S1 (2016) (finding 2.8% of respondents in a large national survey answered that they were informed by a medical professional that they were immunocompromised).

305. *See* McGeehan, *supra* note 295 (describing the how gig workers were classified as essential workers, therefore increasing exposure to COVID-19 with low levels of compensation); *see also supra* Chart A (highlighting the protections offered under federal and state laws).

306. *See supra* Part V.

307. Whirlpool Corp. v. Marshall, 445 U.S. 1, 22 (1980).

308. Moore v. Unemployment Ins. Appeals Bd., 215 Cal. Rptr. 316, 320 (Ct. App. 1985).

309. Wheeler v. Caterpillar Tractor Co., 485 N.E.2d 372 (Ill. 1985).

310. Perez v. Clearwater Paper Corp., 184 F. Supp. 3d 831, 835, 840 (D. Idaho 2016).

311. D'Angelo v. Gardner, 819 P.2d 206, 207–09 (Nev. 1991).

contours of an amended law cannot be discerned casually.[312] However, the Department of Labor (DOL) rule's requirement that an employee can refuse work only when "there is a real danger of death or serious injury and . . . insufficient time, due to the urgency of the situation," to avoid harm could be modified to redefine the time element.[313] This could be broadened to include exposures like those in the foregoing examples.[314] Waiting for a cancer diagnosis to begin the legally sanctioned process of refusing dangerous work is pointless.[315]

In addition, a work refusal rule could be fashioned to address sexual[316] and racial[317] harassment in the workplace that presents a risk of serious injury. Title VII of the Civil Rights Act of 1964[318] could be modified to broaden discrimination to include work refusal in these cases. This revision would seem to address situations where employees are constructively discharged in the course of facing intolerable conditions of harassment that have objective conditions of risk to personal safety.[319]

Finally, the DOL work refusal rule could be broadened to expand the OSH Act's conventional definition of an employee.[320] In the paragraph that regulates work refusal, the rule refers to "employee" five times.[321] To cover gig workers, the rule could be expanded to include the proposed definition of an employee in the Protecting the Right to Organize Act of 2021, a union

312. *See supra* Part I.

313. *See supra* Part V.

314. *See supra* Part V.

315. *See* Michael H. LeRoy, *From Docks to Doctor Offices After 9/11: Refusing to Work Under "Abnormally Dangerous Conditions*,*"* 56 ADMIN. L. REV. 585, 612 (2004) (stating the purpose of work refusal laws is to prevent injuries before they occur).

316. *See supra* notes 283–89 and accompanying text.

317. *See, e.g.*, Turley v. ISG Lackawanna, Inc., 774 F.3d 140, 146 (2d Cir. 2014) (concerning a Black employee who "endured an extraordinary and steadily intensifying drumbeat of racial insults, intimidation, and degradation" for more than three years, including "insults, slurs, evocations of the Ku Klux Klan, statements comparing [B]lack men to apes, death threats, and the placement of a noose dangling from the plaintiff's automobile").

318. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e.

319. Occupational Safety and Health Act of 1970, 29 U.S.C. § 652(3) ("The term 'employee' means an employee of an employer who is employed in a business of his employer which affects commerce.").

320. 29 U.S.C. § 651(b).

321. 29 C.F.R. § 1977.12(b)(2) (2020).

election bill before the 117th Congress.[322]

For now, the state of work refusal safety laws was summed up by a twenty-year-old grocery clerk at Kroger during the COVID-19 pandemic.[323] In response to customers who refused to comply with the store's masking policy, he stated, "They never listen."[324] His exasperation also applies to lawmakers, labor data collection agencies, and judges who miss the many warning signals in work refusal cases that America's workplaces are so dangerous at times that workers are pushed to the brink of resisting work directives.[325]

VI. APPENDIX: ROSTER OF CASES

Federal Court

Supreme Court

Whirlpool Corp. v. Marshall, 445 U.S. 1 (1980)
Gateway Coal Co. v. United Mine Workers, 414 U.S. 368 (1974)

322. Protecting the Right to Organize Act of 2021, H.R. 842, 117th Cong. (1st Sess. 2021) ("This bill expands various labor protections related to employees' rights, [it] (1) revises the definitions of *employee*, *supervisor*, and *employer* to broaden the scope of individuals covered by the fair labor standards . . . ."). Specifically, the bill would amend the definition of the NLRA's Section 2(3) of an employee such that:

> An individual performing any service shall be considered an employee (except as provided in the previous sentence) and not an independent contractor, unless—
> (A) the individual is free from control and direction in connection with the performance of the service, both under the contract for the performance of service and in fact;
> (B) the service is performed outside the usual course of the business of the employer; and
> (C) the individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed.

Id. at § 101.

323. *See supra* Part I.

324. Lam, *supra* note 3.

325. *See supra* Part IV.

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