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The COVID-19 Safety and Health Accreditation Program:  
How Food Safety Inspectors and Building Inspectors Can Incentivize OSHA Compliance to  
Protect Workers During the Coronavirus Pandemic

**I. ABSTRACT**

The coronavirus pandemic exposed the Occupational Safety and Health Administration's (OSHA) severe lack of commitment and resources to enforce standards aimed at providing a safe and healthful workplace for millions of workers who are at an increased risk of exposure to COVID-19 every time they step foot into the workplace. We've seen nurses treating COVID-19 patients pleading for personal protective equipment all across the county,<sup>1</sup> a bus driver in Detroit dying of COVID-19 after complaining about lack of protections from a coughing passenger,<sup>2</sup> and more than three hundred workers testing positive for COVID-19 in one Los Angeles factory, even after the CEO said that precautions for preventing the spread of the coronavirus were implemented.<sup>3</sup> The simple truth is that OSHA needs help to make sure that every worker is protected in the workplace from exposure to the coronavirus, instead of relying on good faith efforts of employers to ensure worker health and safety. This paper proposes an actionable solution that relies on existing resources and infrastructure to provide the much-needed aid that

<sup>1</sup> Michael Schwartz, *Nurses Die, Doctors Fall Sick and Panic Rises on Virus Front Lines*, N.Y. TIMES (Mar. 30, 2020), <https://www.nytimes.com/2020/03/30/nyregion/ny-coronavirus-doctors-sick.html>; Rhea Mahbubani, *Nurses are protesting 'grossly inadequate and negligent' PPE and coronavirus testing while filing lawsuits against state officials and hospitals*, BUSINESS INSIDER (Apr. 21, 2020),

<sup>2</sup> Minyvonne Burke, *Detroit bus driver who posted video about coughing rider dies from coronavirus*, NBS NEWS (Apr. 3, 2020), <https://www.nbcnews.com/news/us-news/detroit-bus-driver-who-posted-video-about-coughing-rider-dies-n1175886>.

<sup>3</sup> Vanessa Friedman, *Los Angeles Apparel Factory Shut Down After More Than 300 Coronavirus Cases*, L.A. TIMES (July 13, 2020), <https://www.nytimes.com/2020/07/13/style/los-angeles-apparel-dov-charney-coronavirus.html>.

OSHA in the following three steps. Step one, the creation of workplace safety and health standards that specifically address the unique nature of COVID-19. Step two, local departments of health and departments overseeing building code compliance take over the task of inspecting compliance with the newly-created standards. Step three, capitalizing on a new form of enforcement, consumer choice, through a visible and easily-distinguishable sign to signify a workplaces' compliance with the standards and posting the status of a workplaces' compliance in a centralized database and on widely-used apps.

## **II. BACKGROUND: Why a COVID-19 Safety and Health Accreditation Program is Necessary to Protect Workers During the Coronavirus Pandemic**

The Occupational Safety and Health Administration (OSHA), the premier government institution responsible for protecting worker health and safety during the current pandemic, is ill-equipped and unprepared to address the COVID-19 pandemic to protect workers from exposure to COVID-19. Since March 11, 2020, when the World Health Organization designated COVID-19 as a global pandemic,<sup>4</sup> workers are putting their lives at risk each time they step into their workplace.

Healthcare workers, on the front-lines of fighting the pandemic, are taking the largest toll. As of July 10, 2020, the Centers for Disease Control and Prevention (CDC) reported 95,860 total cases and 515 total deaths among healthcare personnel.<sup>5</sup> In New York, the first epicenter of the novel coronavirus in the United States, as COVID-19 cases began increasing, personal protective equipment were in short supply.<sup>6</sup> Medical workers were told to keep their protective gear on until

<sup>4</sup> Tedros Adhanom Ghebreyesus, Dir.-Gen., W.H.O, Opening remarks at the media briefing on COVID-19 (Mar. 11, 2020).

<sup>5</sup> *Cases & Deaths among Healthcare Personnel*, CENTERS FOR DISEASE CONTROL (July 20, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> [<https://perma.cc/ZQ7H-5DEQ>]

<sup>6</sup> Michael Schwirtz, *Nurses Die, Doctors Fall Sick and Panic Rises on Virus Front Lines*, N.Y. TIMES (Mar. 30, 2020), <https://www.nytimes.com/2020/03/30/nyregion/ny-coronavirus-doctors-sick.html>

the end of their shift, gear that before the shortage, they changed each time they visited an infected patient.<sup>7</sup> Then, as supplies became more scarce, doctors were asked to use the same masks for days, storing their masks in paper bags between shifts and sterilized for future use.<sup>8</sup>

With countless of nurses contracting COVID-19 and dying from COVID-19, it begs the question, why are nurses, who are at the greatest exposure to coronavirus, left without basic personal protective equipment (PPE) to treat patients with COVID-19? Isn't that against some kind of law? If OSHA cannot even protect nurses, how can we expect OSHA to protect the grocery store workers, waiters, retail workers, and millions of other workers they are tasked to protect?

As with every other industry that the COVID-19 pandemic has wrecked hazard on, there are far and few answers that would be both sufficient and prompt enough to address the current pandemic. What we do know is that the answer to the beforementioned question is yes; there is some kind of law against not providing nurses and other health care professionals with adequate PPE. There is a legally enforceable OSHA standard against providing inadequate PPE to nurses<sup>9</sup>, but the truth is that OSHA, like many other government entities, was grossly unprepared to be able to enforce their standards on a national level during a global pandemic. Unfortunately, OSHA's unpreparedness has come at the expense of the 515 healthcare workers,<sup>10</sup> 100 transit

<sup>7</sup> *id.*

<sup>8</sup> *id.*

<sup>9</sup> See 29 C.F.R §§ 1910.132, 1910.133

<sup>10</sup> *Cases & Deaths among Healthcare Personnel*, CENTERS FOR DISEASE CONTROL (July 20, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> [<https://perma.cc/ZQ7H-5DEQ>]

workers,<sup>11</sup> and 86 meatpacking plant workers<sup>12</sup> that lost their lives due to COVID-19, and the other hundreds of thousands of workers who have contracted COVID-19.

In light of OSHA's failure to protect workers during the COVID-19 pandemic, we need to rethink OSHA's current standard-creating procedure and enforcement mechanisms and see if there is existing infrastructure that can be adapted or shifted to help OSHA address the coronavirus pandemic and protect the millions of workers that rely on OSHA to keep their workplaces safe. No solution is without hurdles, but a COVID-19 Safety and Health Accreditation program, operated by local departments of health and departments overseeing building code compliance may be the best solution we have when the world is up-ended by a global pandemic.

The COVID-19 Safety and Health Accreditation program would give workplaces that comply with COVID-19-specific standards an accreditation that would be displayed on the front door of each workplace. The workplaces will be inspected by local departments of health food inspectors and building code inspectors. The COVID-19 Safety and Health Accreditation program would be able to create standards with the necessary speed to quickly ensure workers are protected from the coronavirus at work, without the chokeholds of the long-drawn out OSHA standard-creating procedures. Furthermore, by using food safety inspectors and building code inspectors, the COVID-19 Safety and Health Accreditation program can immediately be implemented. Using existing government entities, the program will have the resources that OSHA lacks to implement and enforce the COVID-19-specific standards. Meanwhile the

<sup>11</sup> Lois Beckett, *Revealed: nearly 100 US transit workers have died of Covid-19 amid lack of basic protections*, The Guardian (Apr 20, 2020), <https://www.theguardian.com/world/2020/apr/20/us-bus-drivers-lack-life-saving-basic-protections-transit-worker-deaths-coronavirus>.

<sup>12</sup> Amelia Lucas, *CDC says 9% of meatpacking plant workers have been diagnosed with Covid-19*, CNBC (Jul. 7, 2020), <https://www.cnbc.com/2020/07/07/cdc-says-9percent-of-meatpacking-plant-workers-have-been-diagnosed-with-covid-19.html>.

government entities, whose primary functions have slowed down during the pandemic, will facilitate public trust in the accreditation program, thus recruiting consumer pressure to properly incentivize employers to participate in the accreditation program.

### **III. STEP ONE: Creation of COVID-19 Specific Standards**

The first step in implementing the COVID-19 Safety and Health Accreditation program is creating standards that address the unique nature of the coronavirus. Under the COVID-19 Safety Accreditation program, at its bare minimum, accreditation standards could include precautions that have proved the most effective at mitigating the risk of coronavirus-- requiring face masks, frequent hand washing, frequent disinfection of high-touch areas, having readily-available hand sanitizer, moving operations outside if possible, and maintaining six feet of distance or as much distance as feasible between workers and employees.<sup>13</sup>

More expansive standards under private accreditation could be fashioned after existing OSHA guidelines concerning other infectious diseases. The standards could require employers to develop and implement an Exposure Control Plan, similar to the Exposure Control Plans under OSHA's Bloodborne Pathogen standards.<sup>14</sup> The Exposure Control Plan must identify all employees at risk of exposure and describe the risk-producing functions they perform and safety measures that have been implemented to mitigate those risks.<sup>15</sup> Furthermore, the standards could require the Exposure Control Plans to reflect changes in technology and science to reduce

<sup>13</sup> *Protect Yourself*, Centers for Disease Control and Prevention (Jul. 31, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html>. See Michael Levenson, *What We Know About Your Chances of Catching the Virus Outdoors*, N.Y. TIMES (Mar 15, 2020), <https://www.nytimes.com/2020/05/15/us/coronavirus-what-to-do-outside.html>.

<sup>14</sup> Paula Berg, *WHEN THE HAZARD IS HUMAN: IRRATIONALITY, INEQUITY, AND UNINTENDED CONSEQUENCES IN FEDERAL REGULATION OF CONTAGION*, 75 Wash. U. L. Q. 1367,1367 (1997).

<sup>15</sup> *id.*

workers exposure to the coronavirus.<sup>16</sup> Under the standards, workers must receive education on preventing occupational exposure to COVID-19.<sup>17</sup> Employers should also be required to develop a procedure on how to safely integrate workers who have recovered from coronavirus back into the workplace.

Minimum standards and more expansive standards can also be grouped into different accreditation tiers with workplaces who comply with the minimum standards receiving the first level of accreditation and workplaces who comply with the more expansive standards receiving a higher level of accreditation. The different level of COVID-19 Safety and Health Accreditation can be fashioned after the Los Angeles County's Department of Environmental Health's letter grade system for retail food facilities. Under the program, all restaurants, markets, bakeries, and bars located in Los Angeles County receive a score of either A, B, or C based on how many public health risk violations are found during the inspection.<sup>18</sup> A letter grade of A indicates "generally superior in food handling practices and overall food facility maintenance;" B indicates "generally good in food handling practices and overall food facility maintenance; and C indicates "poor in food handling practices and overall general food facility maintenance."<sup>19</sup> The COVID-19 Safety and Health Accreditation program could implement a similar strategy. Because the COVID-19 Safety and Health Accreditation program currently does not exist, it may be more expedient to simply have signs on the entrance of workplaces that either say "COVID-19 Safety and Health: APPROVED" and "COVID-19 Safety and Health: NOT APPROVED," dependent on whether workplaces comply with the minimum accreditation standards. Workplaces that have

<sup>16</sup> *See id.*

<sup>17</sup> *See id.*

<sup>18</sup> L.A COUNTY § 8.04.225 (1997).

<sup>19</sup> *id.*

the highest potential for transmitting the coronavirus, such as hospitals and restaurants, could receive a grade of A, B, or C based on compliance with the more expansive standards.

*Why can't we just follow COVID-19-specific standards created by OSHA?*

OSHA does not have any COVID-19-specific standards and OSHA cannot create COVID-19-specific standards fast enough to protect workers as COVID-19 cases and deaths continue to climb everyday in the United States. Under normal circumstances, there are two ways OSHA standards can be created: the emergency temporary standard (ETS) provision and the normal standard-promulgation procedure. An ETS is OSHA's most dramatic weapon in its enforcement arsenal<sup>20</sup> and the fastest way OSHA could enact COVID-19-specific standards, but OSHA already declined to issue a COVID-19-specific. Consequently, OSHA's fastest mechanism to create standards has already failed to protect workers from the unique nature of the coronavirus.

Under the second, much slower option, to issue a standard, OSHA "must draft, publish, and seek public comment on a proposed rule."<sup>21</sup> Then, OSHA must schedule public hearings to address objections to the proposed rule.<sup>22</sup> OSHA's obligations when creating a standard does not stop there. Under Executive Order 12866, OSHA must quantify and compare the costs and benefits of proposed standards and other available feasible regulatory alternatives.<sup>23</sup> Under the Small Business Regulatory Enforcement Fairness Act, OSHA must provide Congress with a detailed analysis of each new standard for review.<sup>24</sup> Under the Unfunded Mandates Reform Act,

<sup>20</sup> *Asbestos Info. Association v. OSHA* 727 F.2d 415, 426 (5th Cir. 1984).

<sup>21</sup> Paula Berg, *WHEN THE HAZARD IS HUMAN: IRRATIONALITY, INEQUITY, AND UNINTENDED CONSEQUENCES IN FEDERAL REGULATION OF CONTAGION*, 75 Wash. U. L. Q. 1367,1367 (1997).

<sup>22</sup> *id.* at 1377.

<sup>23</sup> *id.*

<sup>24</sup> *id.*



OSHA must assess the impact of a standard on private sector employers and determine whether it imposes any “unfunded mandates” on state, local, or tribal governments.<sup>25</sup> Under the Regulatory Flexibility Act, OSHA must calculate the costs of compliance for small businesses and to assess whether any would be competitively disadvantaged.<sup>26</sup> OSHA must also analyze the environmental impact of the standard and the effects on the employer.<sup>27</sup> Creating a standard by the normal promulgation process typically takes seven years,<sup>28</sup> so if OSHA opted to create a COVID-19-specific standard, by the time a standard could be issued, the dangers of coronavirus would hopefully be eradicated from the workplace.

One of the main benefits of a third-party government accreditation system is the speed in which standards can be enacted and enforced because standards created by the certifier do not have to go through the same procedures as OSHA. Standards created and enforced by the department of health and departments overseeing building code compliance could be immediately issued and enforced because the standards would not have the force of law. Additionally, because the standards do not have to undergo the rigid promulgation process, the standards can also be flexible and adapt as we learn more about COVID-19.

Furthermore, standards created by the third-party government certifiers can protect workers, employers, and the general public, unlike OSHA that must only consider the rights and employees and employers. Because OSHA’s only objective is to protect worker illness and injury, OSHA is unable to create standards that protect both workers and the general public from exposure to the novel coronavirus. For example, because OSHA cannot impose standards intended to protect the health of non-workers, a workplace could be in full compliance with

<sup>25</sup> *id.*

<sup>26</sup> *id.*

<sup>27</sup> *id.*

<sup>28</sup> Jordan Barab, *A Closer Look at OSHA’s Broken Regulatory Process*, Law 360 (June 12, 2017).

OSHA standards when its workers are six feet apart and wear PPE, meanwhile all the customers are all crammed in one stuffy waiting room. Standards created by a certifier have the authority to integrate both OSHA standards to protect worker health and safety and CDC guidelines that are focused on the health and safety of the general public as a whole. Including protections for the general public in the standards would increase the incentives for employers to become certified as well because when the workplace was certified, customers would most likely opt to buy from the workplace where the customer knows precautions have been implemented for their own safety.

#### *Why Can't We Use Existing OSHA Standards?*

While OSHA does not have COVID-19-specific standards, OSHA does have existing standards that do apply to the current pandemic. OSHA's standards do not implement the most effective precautions available to protect workers from the coronavirus. The existing applicable standards to the current global pandemic are: the respiratory protection standard,<sup>29</sup> protective equipment (PPE) standard,<sup>30</sup> and sanitation standard.<sup>31</sup> However, the existing standards do not implement two of the most significant preventors of COVID-19. None of these standards have any social distancing requirements, mandating workers to maintain six-feet of distance from other workers and customers when possible.<sup>32</sup> The existing standards also do not mention anything about conducting business in the outdoors in possible.<sup>33</sup>

#### **IV. STEP TWO: Local Departments of Health and the Departments Overseeing Building Code Compliance Take Over Inspection**

<sup>29</sup> 29 C.F.R 1910.134

<sup>30</sup> 29 C.F.R 1910.132

<sup>31</sup> 29 C.F.R 1910.141

<sup>32</sup> *Protect Yourself*, Centers for Disease Control and Prevention (Jul. 31, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html>.

<sup>33</sup> See Michael Levenson, *What We Know About Your Chances of Catching the Virus Outdoors*, N.Y. TIMES (Mar 15, 2020), <https://www.nytimes.com/2020/05/15/us/coronavirus-what-to-do-outside.html>.

Local departments of health and departments overseeing building code compliance could inspect each workplace to determine whether the workplace is complying with the COVID-19-specific standards. Using existing government agencies, the program will have the resources that OSHA lacks to implement and enforce the accreditation standards. Meanwhile the government entities, whose primary functions have slowed down during the pandemic, will facilitate public trust in the accreditation program, thus recruiting consumer pressure to properly incentivize employers to participate in the accreditation program.

*Why Are Local Food Safety and Building Inspectors Best-Suited to Certify the Workplaces?*

i. Reputation and Resources

State and local health departments and building inspection departments have the reputation and resources to properly incentivize employers from abiding by the COVID-19 Safety accreditation standards and protecting workers from exposure to COVID-19. In order to ensure the legitimacy of the accreditation system, the certification body must be independent, impartial, and transparent.<sup>34</sup> Because local Departments of Health and Departments of Building Inspection are government entities and therefore, already have adequate authority and public trust. Furthermore, because they are government entities, OSHA can maintain adequate oversight over the accreditation program.

ii. Proven Track Record

Department of Public Health food safety inspections have already proven effective. Before letter grades were introduced in Los Angeles, the enforcement mechanism for ensuring compliance to food safety codes was largely similar to OSHA's current strategy. Inspections

<sup>34</sup> Pooja Parikh, *Harnessing Consumer Power: Using Certification Systems to Promote Good Governance*, 34 ELR 10314, 10315 (Apr. 2004).

were done at random and there were little to no consequences when a violation was found.<sup>35</sup> In Los Angeles alone, the public health department inspections contributed to safer food facilities, reduced foodborne illness hospitalizations by 20%, improved consumer information, and created a cultural awareness of food safety.<sup>36</sup> The 10% of the decrease in foodborne illness hospitalizations were attributed to the use of the letter grades.<sup>37</sup> This decrease in hospitalizations continued for the next two years, suggesting the food safety letter grading system was effective for reducing the risk of foodborne disease.<sup>38</sup>

### iii. Similar Goals

Local departments of health and departments that govern building inspections can more easily adapt to enforce the COVID-19 Safety and Health Accreditation program because both departments have a shared goal aimed at protecting workers and the general public's health and safety. Currently, local departments of health perform the following functions to enforce local and state codes concerning food safety: (1) "inspect restaurants, markets, and bakeries to ensure safe food practices; (2) respond to complaints regarding unsafe food practices; and (3) close food facilities when an immediate danger to the public health and safety is present."<sup>39</sup> The Los Angeles Department of Public Health can also oversee coin-operated laundries, animal food stores, public school cafeterias, theaters and public gathering places, food warehouses, and retail

<sup>35</sup> Ginger Zhe Jin, *The Case in Support of Restaurant Hygiene Grade Cards*, American Agricultural Economics Association, Vol. 20, No. 2, 2005.

<sup>36</sup> *Los Angeles Restaurant Grades Lower Illness While Boosting Awareness and Consumer Engagement*, Big Cities Health Coalition, <https://www.bigcitieshealth.org/case-study-los-angeles-food-safety> (last visited Jul. 28, 2020).

<sup>37</sup> *id.*

<sup>38</sup> Paul Simon, et. al., *Impact of Restaurant Hygiene Grade Cards on Foodborne Disease Hospitalizations in Los Angeles County*, J. of Env. Health, March 2005, Vol. 67, 32-36.

<sup>39</sup> *Responsibilities and Services*, COUNTY OF LOS ANGELES PUBLIC HEALTH, <http://publichealth.lacounty.gov/eh/dse/retailfoodinsection/desfood.htm>.

tobacco facilities.<sup>40</sup> Because local and state departments of public health are already charged with overseeing many workplaces that are in dire need of enforcement of COVID-19-specific standards, these departments of public health are uniquely qualified to issue the COVID-19 Safety and Health accreditations.

Generally, departments of buildings are responsible for inspection building compliance with state and local building codes.<sup>41</sup> For example, the San Francisco Department of Building Inspection is responsible for “overseeing the effective and efficient enforcement of building, electrical, plumbing, disability access and housing code” for more than 200,000 commercial and residential buildings.<sup>42</sup> Together, both the health department and departments overseeing building code compliance can inspect and oversee nearly all workplaces to ensure employers are properly implementing precautions to mitigate the spread of the coronavirus.

#### iv. Increased Resources

As COVID-19 cases continue to rise everyday and re-openings are being pushed back, although some cities are shutting construction down and others are granting exceptions only where it relates to “public works construction” and affordable housing.<sup>43</sup> Furthermore, many large companies have completely shifted all employees to remote working. Large tech companies such as Facebook, Twitter, Square, Shopify, Groupe PSA, Box, and Slack have already announced that workers can work remotely for at least the rest of 2020, with many giving workers the opportunity to work remotely forever. With less construction sites and workplaces to oversee, local and state departments overseeing building inspection have more resources to shift

<sup>40</sup> *id.*

<sup>41</sup> Department of Building Inspection, S.F. Government, <https://sfdbi.org> (last visited Aug. 10, 2020).

<sup>42</sup> *id.*

<sup>43</sup> Diana Budds, *How essential is construction during the coronavirus pandemic?*, CURBED (Mar. 30, 2020), <https://www.curbed.com/2020/3/30/21199753/coronavirus-covid-19-construction-industry>

to implementing and enforcing the COVID-19 Safety Accreditation program. Similarly, department of health food inspectors may be less busy too. As of July 7, 2020, restaurant sales experienced an average decline of 61%<sup>44</sup> and by July 24th, 60% of restaurants that temporarily closed due to the pandemic have closed down for good.<sup>45</sup> With less people eating out and more restaurants shutting down, food inspectors may find themselves with more time to enforce the COVID-19 Safety and Health Accreditation program.

*But, Who Would Be In Charge?*

Who would be in charge of the COVID-19 Safety and Health Accreditation program is where things get tricky and presents, probably, the biggest hurdle to overcome in implementing the accreditation program. Although it would be easy to reallocate food inspectors and building code inspectors to inspect workplaces' compliance with the accreditation standards, there still needs to be a centralized oversight body that the inspectors report back to and oversee the accreditation program. The first option is OSHA. OSHA could oversee the accreditation program and would use the food safety inspectors and building code inspectors in the same way OSHA would use the compliance officers who are normally tasked with investigating OSHA-related claims. The main issue with this is that OSHA is already stretched thin, not only in terms of the compliance officers needed to inspect workplaces for the accreditation program, but with personnel both resume normal OSHA functions and respond to the growing number of COVID-19-related OSHA complaints, so OSHA would presumably not have the resources to take on the

<sup>44</sup> Jonathan Maze, *As the Coronavirus Resurges, Restaurant Sales Start Slowing Again*, RESTAURANT BUSINESS (Jul. 07, 2020), <https://www.restaurantbusinessonline.com/financing/coronavirus-resurges-restaurant-sales-start-slowing-again>.

<sup>45</sup> Kelly McCarthy, *Nearly 16,000 restaurants have closed permanently due to the pandemic, Yelp data shows*, ABC News (July 24, 2020), <https://abcnews.go.com/Business/16000-restaurants-closed-permanently-due-pandemic-yelp-data/story?id=71943970>.

added responsibility of overseeing and implementing the COVID-19 Safety and Health Accreditation program.

The second option is that departments of health and departments of building inspection can operate independently. The department of health would be in charge of a certain category of workplaces such as restaurants, grocery stores, and retail stores and the department of building inspection would be in charge of a different category of workplaces such as manufacturing sites, office buildings, and retail stores. Each department would implement and enforce the COVID-19 Safety and Health Accreditation program independently. Similar to how the San Francisco Department of Building Inspection divides its territory into 18 different districts and assigns an inspector to each district, the COVID-19 Safety Accreditation program can be implemented by local departments by dividing the territory into districts and splitting up the existing building code inspectors and food safety inspectors can be split according to the type of workplace. For example, building code inspectors could oversee workplaces that have less interaction with the general public, such as office buildings, manufacturing sites, and retail stores, while food safety inspectors can oversee restaurants and grocery stores. However, defining which workplaces would fall under whose responsibility and consolidating inspection results and data gathered would still require considerable coordination between both departments, which lends to the third option.

Under the third option, the department of health and the department responsible for building inspection would work together to implement the COVID-19 Safety and Health Accreditation program. This is likely the most effective, but trickiest option, as it requires the coordination of two departments that largely do not work together on a normal basis.

*What About When the Pandemic is Over?*

Local and state departments of public health and building code inspection departments already have the infrastructure to adapt to enforce the COVID-19 Safety accreditation program, but can return to their usual functions when COVID-19 no longer presents a danger to the workplace. This is one of the main benefits of using existing government agencies to implement the program because resources and personnel are reallocated according to need, instead of asking Congress to invest millions of dollars that they do not have into OSHA.

### *Preliminary Considerations*

#### i. Certifying the Program

Before implementing and enforcing the COVID-19 Safety and Health Accreditation program, OSHA must review the accreditation standards to ensure compliance with OSHA standards. OSHA must also review inspection protocols and enforcement procedures to ensure that the COVID-19 Safety and Health Accreditation program aligns with OSHA's goals. By retaining oversight of the COVID-19 Safety and Health Accreditation program, the program is afforded the credibility needed to facilitate public trust in the program and by maintaining oversight over the program, OSHA can ensure that the worker's health and safety remain a top concern of the COVID-19 Safety and Health Accreditation program. On the other hand, the CDC may also want to endorse or certify the program to ensure that the standards are crafted and enforced in a way that protects the general public as well. With the certification of OSHA and CDC, the COVID-19 Safety and Health Accreditation program can be implemented and enforced in a way that both protects the workers and the general public from the spread of the coronavirus.

#### ii. Compliance Monitoring



The COVID-19 Safety and Health Accreditation program's standards must require employers to provide evidence of continual compliance. The data compiled would be vastly helpful to OSHA as it would show compliance on a national level and identify any weaknesses of compliance with OSHA standards. Currently, there is no national database on how many essential workers contracted COVID-19. If the standards required employers to report all confirmed COVID-19 cases, this information could be aggregated to create a national database that showed how many essential workers have contracted coronavirus per industry to see which industries are at the biggest risk of a coronavirus outbreak and which industries may have a lower risk and can gradually resume normal operations to aid local and state governments responsibly decide how to re-open and roll-back restrictions.

Second, an effective public complaint mechanism where both employees and customers can issue complaints can also ensure continued compliance as the private certifier would be notified of which workplaces receive the most complaints and can direct their resources accordingly. Furthermore, if employers know that they are being monitored by the certifier, employees, and the general public, employers would be more inclined to comply with the established standards.<sup>46</sup> The number of reports and the type of complaint should be available to the public to increase public pressure for employers to continue to comply with the accreditation standards. This would put public pressure on the employers to continue to comply with the standards after they are accredited because of the threat of accountability through consumer choice.

## **V. STEP THREE: Consumer Choice as an Enforcement Mechanism**

<sup>46</sup> See Spencer EA, *Hawthorne bias*, Sackett Catalogue of Bias Collaboration 2017, <https://catalogofbias.org/biases/hawthorne-effect/>

The biggest limitation of the COVID-19 Safety and Health Accreditation is that it lacks the authority to issue citations and fines as a means to enforce its standards. The only enforcement mechanism that can be used during a third-party accreditation program is taking away the accreditation. Although taking away an accreditation may seem too weak to incentivize compliance, because the accreditation is issued by local departments of health and departments of building inspections, government institutions, the accreditation program will be afforded more credibility. Moreover, as the public trust and acceptance of the accreditation program grows, the threat of taking away accreditation becomes a much greater enforcement mechanism.

After inspection, workplaces with the COVID-19 Safety and Health Accreditation will be given a sign to signify to the public that the workplace is accredited. In order to get public participation and public pressure for workplaces to become certified, there must be a visible sign in the front of the workplace to distinguish workplaces that are accredited. The sign must be easily identifiable, similar to the health score that is mandated in Los Angeles County to be put on the front door of a business, where restaurants are required to post their health score of A, B, or C, indicating their level of compliance to food safety codes, on the front of the restaurant.<sup>47</sup>

Although a sign is just a piece of paper, the sign is a key part of the COVID-19 Safety and Health Accreditation program. Because the standards are not legally enforceable, the COVID-19 Safety and Health Accreditation program relies on consumer trust and buy-in. By making the certification sign visible and easily-searchable online, workplaces in businesses with the largest risk of exposure would have the highest incentives to become certified, as there would be the greatest consumer demand for proof that the workplace is taking precautions to protect the

<sup>47</sup> Janet Fleetwood, *Scores on doors: restaurant hygiene ratings and public health policy*, J. of Public Health Policy, Vol. 40, 410-422 (2019).

health and safety of their workers and their consumers, with customers choosing to support businesses with an accreditation compared to a similar non-accredited businesses.

We can learn from Los Angeles County’s Department of Public Health’s efforts to ensure restaurants comply with measures intended to prevent the spread of the coronavirus. As of July 1, 2020, all restaurants in the county must complete a checklist that covers “(1) workplace policies and practices to protect employee health; (2) measures to ensure physical distancing; (3) measures to ensure infection control; (4) communication with employees and the public; and (5) measures to ensure equitable access to critical services.”<sup>48</sup> All restaurants must satisfy all requirements on the checklist and “be prepared to explain why any measure that is not implemented is not applicable to the business.”<sup>49</sup> As a part of the checklist, a copy of this protocol must be posted at all public entrances to the facility.<sup>50</sup> However, taping eight pages of a wordy document in small font does little to educate the public on the Department of Public Health’s efforts. Most people will not read the documents posted on the door because the document is too long.

In order for the public to be informed, the signage on the door must be clear, concise, and easily digestible at a glance. Therefore, the sign indicating the restaurants are complying with the checklist must be as easily understood as the food letter grade system. A customer can immediately identify a score of an A, B, or C on the door of a restaurant and immediately know what the score means, that is why, in part, the food letter grade system has shown to be effective; it is easy to understand and easily recognizable. Following the food letter grade system, the eight

<sup>48</sup> *Protocol for Restaurants: Appendix I*, Order of the Health Officer, CTY. OF L.A DEP’T OF PUB.HEALTH (July 1, 2020),

[http://www.ph.lacounty.gov/media/Coronavirus/docs/protocols/Reopening\\_Restaurants.pdf](http://www.ph.lacounty.gov/media/Coronavirus/docs/protocols/Reopening_Restaurants.pdf).

<sup>49</sup> *id.*

<sup>50</sup> *id.*

page signage on the doors should be condensed to one page with large font. Because the COVID-19 Safety and Health Accreditation is new and unknown by the public, the signage must communicate what the program is and the status of the workplace. Therefore, workplaces that are accredited should be required to post a sign in the entrance that says “COVID-19 SAFETY AND HEALTH: APPROVED” in large green writing and workplaces that are not accredited “COVID-19 SAFETY AND HEALTH: NOT APPROVED” in large red writing. The language COVID-19 SAFETY AND HEALTH and “approved” versus “not approved” clearly indicates the status of the workplace regarding their coronavirus precautions in a way that consumers can understand. If the Department of Public Health want to utilize grade like the food letter grade system, the letter grade can simply be added under the approved versus not approved.

As public awareness and acceptance of the accreditation program grows, the COVID-19 Safety Accreditation signs will become part of consumer culture, similar to the beforementioned Los Angeles County’s food safety letter grades. Consumers will regularly check whether workplaces are accredited before deciding to spend money there and consumers will eventually expect establishments to receive the accreditation, which will further incentivize workplaces to renew their accreditation and new workplaces to become accredited.

Posting the inspection results and grade online provide information to consumers to help them “vote with their wallets.” COVID-19 Safety and Health Accreditation inspection results and accreditation status of workplaces should be published on government websites and integrated into widely-used apps and websites to increase the threat of consumer accountability.

Yelp already helps facilitate the spread of health-related information to help inform consumer choice and increases pressure on restaurants to comply with food safety codes. Yelp began to include food safety letter grades on restaurant pages, increasing consumer awareness to

the letter grade system by providing food safety information for over 1.16 million restaurants throughout the United States.<sup>51</sup> Yelp can easily implement a feature to inform the millions of Yelp users of a workplaces' COVID-19 Safety and Health Accreditation status, Yelp already has implemented a COVID-19 feature on their site and app, which indicates how the business has been impacted by the COVID-19 pandemic, details include if their hours have changed and what precautions the business is implementing to prevent the spread of coronavirus.<sup>52</sup> Because this feature already exists, COVID-19 Safety and Health Accreditation information can be easily implemented in the website. A case study in Tippecanoe County in Indiana showed that publishing food safety inspection scores resulted in a decrease in consumer complaints to the health department and an increase in overall inspection scores.<sup>53</sup> This suggests that the greater awareness of an enforcement mechanism and a greater threat of public accountability may result in safer food practices.<sup>54</sup> With more information about safety practices given to the public, especially when COVID-19 is a great concern among consumers, the COVID-19 Safety and Health Accreditation information being posted online and on the door allow consumers to substitute demand away from workplaces that do not take precautions to prevent the spread of coronavirus and toward workplaces that practice precautions and demonstrate great concern for the health and safety of their workers and consumers.

*How Is Relying on Consumer Choice Better Than OSHA's Current Enforcement Mechanisms?*

<sup>51</sup> Janet Fleetwood, *Scores on doors: restaurant hygiene ratings and public health policy*, J. of Public Health Policy, Vol. 40, 410-422 (2019).

<sup>52</sup> Taylor Lyles, *Yelp now lets businesses list the COVID-19 safety measures they're taking*, THE VERGE (Jun. 16, 2020), <https://www.theverge.com/2020/6/16/21291496/yelp-new-coronavirus-safety-tools-business-owners>.

<sup>53</sup> Barbara Almanza, et. al., *The Impact of Publishing Foodservice Inspection Scores*, J. of Foodservice Business Research, 5 vol. 5, 45-62 (2002).

<sup>54</sup> *See id.*

Although relying on consumer choice rather may seem like a weak enforcement mechanism, because OSHA lacks the resources to enforce existing standards to properly incentivize workplaces to comply with the COVID-19-related standards, relying on consumer choice may be the only enforcement mechanism available. Strong enforcement and penalties are effective in assuring compliance to OSHA standards.<sup>55</sup> However, even under normal non-pandemic circumstances, OSHA lacks funding to consistently inspect workplaces to make good on the threat of enforcement. “There are only 4,000 OSHA Compliance Officers to inspect and ensure the safety of more than 92 million employees. Even in industries that are the target of most inspections, inspections of a workplace only average once every eight to ten years.”<sup>56</sup> However, those are industries that are the target of most inspections, when accounting for all workplaces, OSHA inspects a workplace once every 107 years.<sup>57</sup> From 2004-2009, OSHA failed to inspect 75% of the 6,411 sites where a fatal or serious accident occurred.<sup>58</sup> COVID-19 presents an even greater strain on enforcement resources. If OSHA cannot even enforce its regular standards, OSHA is surely incapable of adapting to the dangers presented by the current pandemic.

Penalties for OSHA violations also do not provide any incentive to obey them. Criminal prosecution is rare and fines are very modest. The maximum fee for a willful violation is \$70,000 and for a serious violation is \$7,000.<sup>59</sup> With citations so small, the small risk of being issued a

<sup>55</sup> See David Levin et. Al., *Randomized Government Safety Inspections Reduce Workers Injuries with No Detectable Job Loss*, 336 A.A.A.S. 6083, 907-911 (May 18, 2020).

<sup>56</sup> *id.*

<sup>57</sup> *Death on the Job: A National and State-by-State Profile of Worker Safety and Health in the United States*, AFL-CIO, 140 (Apr. 2019), <https://aflcio.org/sites/default/files/2019-04/DOTJ2019nb.pdf>

<sup>58</sup> Jae-Young Choi, *Developing Oversight Approaches to Nanobiotechnology: The Lessons of History: Review of the OSHA Framework for Oversight of Occupational Environments*, 37 J.L. Med. & Ethics 633 (2009).

<sup>59</sup> 29 U.S.C. § 666

citation is just a cost of business, especially when businesses are faced with the threat of bankruptcy from loss profits due to stay-at-home orders and reduced business. Small penalties and little risk of getting caught result in no accountability for employers at the cost of millions of workers exposed to COVID-19.

In order to properly incentivize employers to comply with OSHA standards, the cost of obeying regulations must be greater than the cost of noncompliance. Currently, there is little risk of accountability as inspections are so infrequent and citations are not high enough to deter. Rather, there is much greater incentives for noncompliance as the cost of obeying standards and guidelines cost money to buy all the PPE and necessary equipment and reduce the number of customers and workers at a time greatly outweigh the need for employers to re-open without restrictions to increase business after lockdowns where businesses were losing lots of money. Even when cases in Los Angeles were peaking, businesses still demonstrated a failure to comply to laws mandated to protect workers and the general public from contracting COVID-19. As of April 7, 2020, the Los Angeles Police Department had already issued 37 complaints against businesses that did not comply with COVID-19-related orders.<sup>60</sup> On June 18, 2020 as Los Angeles restaurants were permitted to reopen at 60% capacity, half of 2,000 restaurants inspected were not following health guidelines to mitigate the spread of COVID-19.<sup>61</sup>

In the first five months of the pandemic, OSHA has already demonstrated its inability to timely investigate and enforce its standards. As of July 7, 2020, OSHA received 6,310 federal

<sup>60</sup> Richard Winton, *LAPD files 37 complaints against businesses for violating coronavirus closure rules*, L.A. TIMES (Apr. 7, 2020), <https://www.latimes.com/california/story/2020-04-07/lapd-businesses-violating-coronavirus-closure-rules>.

<sup>61</sup> Colleen Shalby & Alex Wigglesworth, *At least 1,000 L.A. county restaurants not following coronavirus safety rules, inspections show*, L.A. TIMES (June 15, 2020), <https://www.latimes.com/california/story/2020-06-15/california-coronavirus-cases-top-150-000-and-thats-not-counting-anyone-from-the-protests>.

complaints and 15,657 state complaints. Out of the 6,310 federal complaints received since the pandemic started, already 5,449 of those complaints have already been closed and only 364 (5%) of those complaints had resulted in an inspection. 10,078 of the 15,657 of the state complaints have been closed and only 364 (2%) of those complaints resulted in an inspection. On the federal level, OSHA only has 2,100 inspectors who are responsible for ensuring the safety of over 130 million workers.

With the lack of employees responsible to reviewing and acting on the thousands of COVID-19-related complaints OSHA received, it is no surprise that OSHA has only issued one COVID-19-related citation in the five months the COVID-19 pandemic for failure to report a hospitalization. With the one citation issued, OSHA demonstrates its inability to proactively protect workers from exposure to the coronavirus exposure. The citation for record-keeping, untimely reporting of hospitalizations, was issued only after six nursing home employees were hospitalized after contracting COVID-19 at work. OSHA imposed only a \$6,500 fine for the violation. OSHA did not cite the workplace for any violations of OSHA standards that resulted in six employee hospitalizations. Furthermore, it is unlikely OSHA would be able to prove a similar violation of untimely reporting of hospitalizations because under the recordkeeping standard, an employer is only required to report the hospitalization if it is “work-related” and the hospitalization occurred within 24 hours of working. Given the nature of COVID-19 in that symptoms do not typically appear until two weeks after exposure, it would be extremely difficult to determine whether the employee contracted COVID-19 at work and it would be unlikely for a hospitalization to occur 24 hours after work.

*Why Would Businesses Become Certified Under the COVID-19 Safety Accreditation Program If It Is Not Legally Required?*



The COVID-19 Safety and Health Accreditation program allows consumers to vote with their wallets and workplaces. After Los Angeles introduced letter grade system for food safety for restaurants, A-rated restaurants earned 5.7% more revenue than before the letter grade system started, while B-rated restaurants did not see an increase in revenue, and C-rated restaurants had a 1% decrease in revenue during the same time frame.<sup>62</sup> Of the 2000 residents in Los Angeles County surveyed, 77% noticed the posted grade always or most of the time and only 3% would go to a restaurant with a C grade.<sup>63</sup> The same was found in New York City as well, where facilities with A grades reduced the probability of restaurant closure and increased revenue while increasing sale taxes remitted and decreasing fines relative to B grades and C graded facilities experienced a decrease in revenues and increase probability of restaurant closure.<sup>64</sup> Unsurprisingly, 88% of New York City respondents said letter grades factored into dining decisions.<sup>65</sup> Therefore, workplaces with the highest risk of transmission of coronavirus would be incentivized to become accredited/approved and receive a high grade if the grading system is implemented.

With the increasing trend toward more ethical considerations for consumers, coupled with consumer concern with their own health and safety, the incentive to opt into the accreditation system is amplified. 65% of global consumers are drawn towards companies that treat employees well.<sup>66</sup> 74% of consumers said they want more transparency in issues such as

<sup>62</sup> *id.*

<sup>63</sup> Janet Fleetwood, *Scores on doors: restaurant hygiene ratings and public health policy*, *J. of Public Health Policy*, Vol. 40, 410-422 (2019).

<sup>64</sup> Michah Rothbart, et. al., *What a Difference a Grade Makes: Evidence from New York City's Restaurant Grading Policy*, *Public Administration Review*, 5 vol. 79, 651-665 (Sep. 2019).

<sup>65</sup> *id.*

<sup>66</sup> Peter Adams, *63% of consumers prefer to purchase from purpose-driven brands, study finds*, *MARKETING DRIVE* (Dec. 6, 2018), <https://www.marketingdive.com/news/63-of-consumers-prefer-to-purchase-from-purpose-driven-brands-study-finds/543712/>.

safe working conditions.<sup>67</sup> 63% of global consumers prefer to buy products and services from companies that reflect their own values and beliefs and will avoid companies that do not.<sup>68</sup>

With 63-67% of Americans concerned about coming into the contact with the virus,<sup>69</sup> it seems there is huge financial incentive for employers to not only demonstrate that they care about their workers, but the health and safety of their customers as well. Therefore, there would be huge public pressure to take precautions. The greatest public pressure would be placed on workplaces that have the greatest interaction with the general public and therefore the greatest risk of transmission of COVID-19 because of the public's concerns with their own safety and the visibility of the precautions the employers are taking to protect their workers. On the other hand, in industries such as manufacturing, where there is little to no interaction between the workers and the general public, public pressure would rely solely on consumer's concern for the worker safety. A continued connection between positive public opinion and attainment of accreditation could create an associated bias by consumers towards accredited entities over similar, unaccredited entities. As a result, entities that desire to remain competitive will pursue accreditation. Thus, contributing to the positive accreditation and as the reputation grows, the public demand for it will likely follow.

## **VI. CONCLUSION**

As for now, COVID-19 will not present a grave danger to workers forever, but for now, it is here to stay. Employers cannot idly be exposed to COVID-19 just because this is a once-in-a-century virus. OSHA should not just dismiss the coronavirus because it is a once-in-a-century pandemic when over three million Americans have been infected. Instead, the COVID-19 Safety

<sup>67</sup> *id.*

<sup>68</sup> *id.*

<sup>69</sup> Zach Hrynowski, *66% of Americans Remain Worried About Exposure to COVID-19*, GALLUP (June 17, 2020), <https://news.gallup.com/poll/312680/americans-remain-worried-exposure-covid.aspx> [perma]

and Health accreditation program would ensure that workplaces are ready for the next pandemic to instill confidence in not only the workers that they are entrusted to protect, but to the general public.

The dangers presented by the coronavirus pandemic is not going away anytime soon, but it will hopefully go away eventually that is why it is impractical to create a government institution solely dedicated to the pandemic. Local Departments of Public Health and Departments of Building Inspection already have infrastructure to respond to the pandemic and when the pandemic is over, resources can be diverted to the department's usual functions.